No. 02-281-CFX Title: Inyo County, California, et al., Petitioners
v.
Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, et al.

Docketed:
August 23, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 19 2002	Petition for writ of certiorari filed. (Response due October 23, 2002)
	Sep 6 2002	Order extending time to file response to petition until October 23, 2002.
	Oct 21 2002	Brief amicus curiae of California State Sheriffs' Association filed.
	Oct 21 2002	Brief amici curiae of National Sheriffs' Association, et al. filed.
	Oct 23 2002	Brief of respondents Bishop Paiute Tribe, et al. in opposition filed.
	Oct 23 2002	Brief amici curiae of California, et al. filed.
	Oct 23 2002	Brief amici curiae of Los Angeles County, et al. filed.
	Nov 6 2002	DISTRIBUTED for Conference of November 27, 2002
	Nov 8 2002	Reply brief of petitioners Inyo County, et al. filed.
	Dec 2 2002	Petition GRANTED. SET FOR ARGUMENT March 31, 2003. **********
	Dec 23 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including January 23, 2003. Order extending time to file respondent's brief on the merits to and including February 27, 2003.
	Jan 22 2003	Brief amici curiae of Los Angeles County, et al. filed.
	Jan 22 2003	LODGING consisting of twelve copies of related material received from counsel for amici California, et al.
	Jan 22 2003	LODGING consisting of twelve copies of related material received from counsel for amici California, et al.
	Jan 23 2003	Brief amici curiae of National Sheriffs' Association, et al. filed.
	Jan 23 2003	Joint appendix filed.
	Jan 23 2003	Brief of petitioners Inyo County, et al. filed.
	Jan 23 2003	Brief amicus curiae of California State Sheriffs' Association filed.
	Jan 23 2003	Brief amici curiae of California, et al. filed.
	Jan 23 2003	Brief amicus curiae of United States filed.
	Jan 28 2003	LODGING consisting of twenty copies of a memorandum received from counsel for amici States received and distributed.
	Feb 3 2003	CIRCULATED.
	Feb 4 2003	Record filed.
	Feb 11 2003	Record filed.
	Feb 25 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 27 2003	Brief of respondents Bishop Paiute Tribe and Bishop Paiute

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No. 02-281-CFX

Entry	Date	Proceedings and Orders
		Gaming Corporation filed.
	Feb 27 2003	Brief amici curiae of New Mexico, et al. filed.
	Feb 27 2003	Brief amici curiae of National Congress of American Indians, et al. filed.
	Feb 27 2003	Brief amicus curiae of United South and Eastern Tribes, Inc. filed.
	Mar 20 2003	Reply brief of petitioners Inyo County, et al. filed.
	Mar 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 31 2003	ARGUED.

Supreme Court, U.S.
FILED

02 281 AUG 9 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and is also the elected District Attorney of Inyo County. He has been sued in his individual capacity, as well as in his official capacity as the District Attorney. Petitioner Dan Lucas is an individual, and is also the elected Sheriff of Inyo County. He also has been sued in his individual capacity, as well as in his official capacity as Sheriff. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The January 4, 2002, opinion of the Ninth Circuit (App., infra, pages 9a-43a) is reported at 975 F.3d 893. The May 20, 2002, order of the Ninth Circuit (App., infra, pages 1a-8a) amending the 1/4/02 opinion, and denying the petition for rehearing *en banc*, was ordered to be published. The November 22, 2000, order of the District Court (App., infra, 44a-66a) granting petitioners' motion to dismiss, and the judgment entered thereon in favor of petitioners, is unreported.

The January 4, 2002, opinion as amended by the May 20, 2002, order has been republished at 291 F.3d 549.

JURISDICTION

The original opinion of the Ninth Circuit was filed January 4, 2002. Petitioners' timely petition for rehearing *en banc* was denied on May 20, 2002, and the Ninth Circuit's order amending the original opinion, and denying the petition for rehearing *en banc*, was filed and entered on that same date.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 42 U.S.C. § 1983.

This statute concerns and is entitled "Civil action for deprivation of rights." It is set forth in App. D, infra, page 67a.

3. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." It is set forth in App. D, infra, pages 67a-68a.

4. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." It is set forth in App. D, infra, pages 68a-69a.

5. 18 U.S.C. § 1162.

This statute concerns State criminal law jurisdiction over criminal offenses committed by or against Indians in the Indian country within the six States identified in the statute. It does not address State criminal jurisdiction over criminal offenses committed off the reservation or otherwise outside of Indian country. This statute is commonly known as "Public Law 280," and its pertinent text is set forth in App. D, infra, pages 69a-71a.

STATEMENT OF THE CASE

In March 1999, the California State Department of Social Services sent to the Inyo County Department of Health and Human Services a report known as the "IEVS/Integrated Fraud Detection System Report." (Excerpts of Record ("ER") 136-A and 266.)

This report is generated by the State from payroll information submitted by employers throughout the State. In order to generate the report, the California Department of Social Services "matches" the employer-reported income against the income being reported by persons receiving State public welfare assistance. When a "mismatch" is discovered, that is, when the amount of wages being reported by employers is in excess of that being reported by the public assistance recipients, the "Integrated Fraud Detection System Report" is sent to the County administering the public assistance.

The Integrated Fraud Detection System Report sent to Inyo County advised that the Paiute Palace Casino, which is a gambling casino operated in Inyo County by respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and by respondent Bishop Paiute Gaming Corporation (herein collectively referred to as "Paiute-Shoshone"), had reported on its State employer's quarterly payroll tax returns that it had paid certain income to three employees identified in the report, and that these three employees, who were recipients of California public assistance welfare benefits for the time period involved, had not reported such income on their welfare application forms.

In short, these three employees, identified in the Integrated Fraud Detection System Report as Patricia Dewey, Clifford Dewey, and Tinya Hill, were reported as having

earned income from Paiute-Shoshone, but had not reported that income to the State and County in connection with their (the employees') applications for public assistance welfare benefits, and in connection with the determination of the amount of their entitlement to those benefits.

After receipt of this information, the Inyo County Department of Health and Human Services notified the three employees of the discrepancies, and made requests that the employees reconcile the same. These requests were ignored.

The Department of Health and Human Services then forwarded the matter to the Inyo County District Attorney's Office for review, and the matter was assigned to DA Investigator Leslie Nixon, a California peace officer employed at the District Attorney's Office. After reviewing the files and matter, Investigator Nixon submitted her own requests to the three employees, asking that the income discrepancies be reconciled. Again these requests for reconciliation were ignored.

Thereafter, in what may in part be a disputed factual background (which is not controlling, however, with regard to the matters before the Court), Investigator Nixon sent a letter-request to the Paiute Palace Casino, asking for the relevant payroll information for the three casino employees who were the subject of the State's Integrated Fraud Detection System Report.

Although Paiute-Shoshone had in the past honored such informal requests without a search warrant, on this occasion, it advised that it would not release the requested

payroll information unless a search warrant was obtained.[1] This request did not appear entirely extraordinary, even though the informal letter-requests for information had been honored in the past, because on at least one other occasion, within the preceding year, the District Attorney's office had, after receiving an earlier California State IEVS/Integrated Fraud Detection System Report, requested similar payroll information from another tribal office, for a different employee, and been told that a search warrant would be required. In that case, the District Attorney's office had then obtained and served a similar search warrant, and the payroll records then at issue were obtained pursuant to the warrant.[2]

In any event, after her request to the casino for the subject payroll information was denied, Investigator Nixon submitted an affidavit in support of a petition for a search warrant to the California Superior Court. In summary, the affidavit advised of the IEVS/Integrated Fraud Detection System Report, and further provided that overpayment of benefit amounts in excess of $400.00 appeared to be in issue. The conduct being investigated, theft of public funds, was within the parameters of several California criminal statutes,

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[1] Paiute-Shoshone has not acknowledged that this representation of the need for a search warrant was made by its personnel.

[2] These facts appear to be in dispute in the following regard, but again, the disputed facts are not controlling: Respondent Paiute-Shoshone has not acknowledged the prior providing of similar payroll information pursuant to informal letter-request, nor has it acknowledged its prior honoring of a similar search warrant. Paiute-Shoshone alleges in its complaint that it had a long-standing policy not to release the information without a signed authorization from the employee involved. (ER 010).

including grand theft, a felony, in violation of California Penal Code § 487(a).[3]

Based on the affidavit, a search warrant was issued by the California Superior Court on March 23, 2000. The search warrant provided in pertinent part as follows:

> "The people of the State of California to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo.
>
> "Proof by affidavit having been made this day before me . . . that the following ground or grounds for issuance of a search warrant exist:
>
> > "The property or things to be searched for consist of an item or items or constitute evidence which tend to show a felony has been committed or tend to show that a particular person has committed a felony,
>
> "YOU ARE THEREFORE COMMANDED to make a search in the daytime (7:00 a.m. to 10:00 p.m.) on and of the premises described as: Paiute Palace Casino located at 2742 North Sierra Highway 395, Bishop, Inyo County, California, for the following property: Payroll records for Patricia Dewey, date of birth 9-20-59, social security number 556-33-3889; Clifford Dewey, date of birth 11-27-54, social security number 558-98-0356; and Tinya Hill, date of birth 2-23-79, social security number 571-55-4327, for the period of April 1998 through June 1998, and if you find the same or any part thereof, to bring it forthwith as required by law before this court at 301 West Line Street, Bishop, California.
>
> "Given under my hand and dated, 3/23/00,
>
> "/s/ Patrick C. Canfield"
> (Excerpts of Record ("ER") 138-140)

[3] California Penal Code § 487(a) provides: "Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400). . . ."

Investigator Nixon then attempted to execute the search warrant at the casino. Upon arrival, however, she was told by Paiute-Shoshone that the warrant would not be recognized, that the casino was immune from search because Paiute-Shoshone was a sovereign government, and that although the records being sought by the search warrant were located in an out-building behind the casino, she (Investigator Nixon) was prohibited from searching for the records, and was being denied access to the out-building.

In order to mitigate the potential for disturbance, Investigator Nixon asked that the Sheriff's Department be called. Sheriff's deputies responded, and after reviewing the warrant, advised that it appeared proper. Paiute-Shoshone continued to deny the request for the key to the padlock securing the out-building, and accordingly, bolt cutters were used to cut the padlock. Investigator Nixon then searched the out-building, and the records described in the search warrant were located and obtained. (ER 267-328). Those records were then made the subject of a proper Return on the search warrant, and the same was filed with the Superior Court. (ER 263-264)

The records obtained were of two types. The first type consisted of individual pages of computer records showing the hours worked, and compensation paid, for each of the three persons identified in the search warrant, for the time period specified in the warrant. The second type consisted of the portion of Paiute-Shoshone's employer's payroll tax returns that involved the reported wages of the three subject casino employees, as submitted to the State of California, for the time period specified in the search warrant.

Care was taken by Investigator Nixon to obtain only specific pages of records that actually contained the name and information pertaining to at least one of the three subjects identified in the search warrant. Thus, each page of information obtained contained information for one or more of the three subjects. [4]

Paiute-Shoshone thereafter filed this action in District Court, seeking declaratory and injunctive relief, and also

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[4] Respondents have contended that the scope of the search exceeded that allowed by the warrant, because the computer lists of names on the pages seized contained information pertaining not only to the three subjects of the warrant, but also to other employees whose names were close in alphabetical order to the subjects' names, and therefore listed on the same page. Paiute-Shoshone therefore claimed that the "personnel records" of the other employees listed on these pages were improperly seized. The District Court rejected this argument, and stated: "Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's scope because each page contained at least one reference to the employees that were under investigation." (App. page 58a; ER 217; and ER 267-328, consisting of a copy of each of the actual pages seized.)

seeking monetary damages for violation of its claimed Fourth Amendment rights pursuant to 42 U.S.C. § 1983. Attorneys fees and costs pursuant to 42 U.S.C. § 1988 were also sought. (ER 005-023).

In August 2000, petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their motion for dismissal of the complaint pursuant to F.R.C.P. § 12(b)(6).

On November 22, 2000, the District Court filed its Order Granting Defendants' Motion to Dismiss, and judgment was entered in favor of petitioners Inyo County, Mr. McDowell and Sheriff Lucas on that same date. (App., infra, pages 44a-66a).

Respondent Paiute-Shoshone timely appealed the District Court's order and judgment entered thereon, and on January 4, 2002, the Ninth Circuit filed its initial opinion, reversing the District Court's judgment entered in favor of petitioners. (App., infra, pages 9a-43a).

Inyo County, Mr. McDowell and Sheriff Lucas then timely filed a petition for rehearing en banc, and on May 20, 2002, the Ninth Circuit entered its order denying the petition for rehearing, and amending its earlier opinion. (App., infra, pages 1a-8a).

REASONS FOR GRANTING THE PETITION

The opinion of the Ninth Circuit in this case establishes at least hundreds, and perhaps many more, Indian tribal enclaves that are now sanctuaries where evidence of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officers who are investigating the violation of off-reservation State crimes, even when those law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves are tribal commercial gambling casinos, which are proliferating throughout the nation,[5] other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and other Indian country within the States of the Ninth Circuit. These include, of course, legal cases of the Ninth Circuits California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, and Hawaii, as well as within Guam and the Northern Mariana Islands.

The asserted legal basis of the Ninth Circuit's opinion which is *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), is so broad that it includes within its parameter the prohibition of even federal law-enforcement officers from obtaining search warrants for tribes, tribal businesses and tribal offices when investigating and prosecuting State crimes under the General Crimes Act, and under the Major Crimes Act, which are set forth at 18 U.S.C. Sections 1152 and 1153, respectively.

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity on federal law enforcement, investigation of federal crimes, is unclear, but this may also be impacted.

In issuing this opinion, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. The Ninth Circuit has also decided an important federal question in a way that conflicts

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[5] According to its Website, even Harroh's Entertainment, Inc., a major corporation traded on the New York Stock Exchange, now operates large Indian gambling casinos and resorts on Indian reservations in the Ninth Circuit, and well as elsewhere in the nation.

in principle, if not directly, with relevant decisions of this Court. Moreover, the decision below is incorrect.

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The primary question presented concerns whether the doctrine of tribal sovereign immunity enables Indian tribes, and their gambling casinos and other tribal businesses, to prohibit searches of their property for criminal evidence of off-reservation State crimes, when the search is pursuant to a search warrant issued on probable cause in accordance with Fourth Amendment standards. [6] This important question of federal law has not been, but should be, settled by this Court.

Tribal sovereign immunity is "immunity from suit." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757 (1998). *Turner v. United States*, 248 U.S. 354 (1919). It developed "almost by accident." *Kiowa Tribe of Oklahoma, supra*, page 756. The *Turner* case, *supra*, which is the authority upon which tribal sovereign immunity relies for its existence, has recently been described by the Court as "but a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa Tribe of Oklahoma, supra,* page757.

There is no Supreme Court or other Court of Appeals precedent known to petitioners that has ever extended the

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[6] To the extent that any decision and supporting analysis by the Supreme Court is also applicable to on-reservation State crimes, that question may also be answered.

doctrine of tribal sovereign immunity - immunity from suit - to immunity from search for criminal evidence pursuant to a search warrant where the state has the jurisdiction to prosecute the crime involved. Indeed, there is no Supreme Court precedent known to petitioners that has ever even intimated such.

Further, even the continued viability of the doctrine of tribal sovereign immunity, with regard to immunity from suit, in today's "wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," is being questioned. *Kiowa Tribe of Oklahoma, supra*, page 757-758.

The Supreme Court recently observed:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Potawatomi, supra*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have

> no choice in the matter, as in the case of tort victims." *Kiowa Tribe of Oklahoma, supra*, page 758.

Despite this current questioning of the continued viability of tribal sovereign immunity, even in its traditional role of immunity from civil suit, the Ninth Circuit's opinion herein has decided an important question of federal law in such a manner as to extend the principle of tribal sovereign immunity to non-civil, that is, criminal matters, and thereby enable the multitude of Indian tribes in the Ninth Circuit, and their gambling casinos and other businesses, to prohibit the searching of their property for criminal evidence pertaining to off-reservation (and on-reservation) commission of State crimes, even when the search is pursuant to a search warrant, issued upon probable cause, satisfying the Fourth Amendment standards for the same. (App., infra, pages 21a-24a).

This opinion by the Ninth Circuit is broad enough to include within its parameters the holding that Indian tribes, their casinos and businesses are immune from search for criminal evidence even when the search is undertaken by federal law-enforcement officers in their investigation of State crimes committed on a reservation, in States subject to the General Crimes Act and Major Crimes Act (18 U.S.C. Sections 1152 and 1153, respectively).

This breadth of scope of the Ninth Circuit's opinion flows from its analysis which led to its decision in this case. The Ninth Circuit's analysis is, in summary, as follows: In 1992, the Ninth Circuit decided the case of *United States v. James*, 980 F.2d 1314 (9th Cir. 1992). In *James*, the Ninth Circuit held that the Quinault Indian Nation was immune from service of a federal subpoena, for a tribal-clinic's psychological records of an Indian victim/patient, when that subpoena was requested by the Indian defendant being

prosecuted for the on-reservation rape of the Indian victim/patient. The defendant was being prosecuted by the federal government, for violation of the State's criminal law, pursuant to the Major Crimes Act, 18 U.S.C. § 1153.

In *James*, *supra*, the Ninth Circuit held that the tribe could assert tribal sovereign immunity against the federal subpoena, and thereby avoid having to comply with the federal subpoena.

In this case, the Ninth Circuit used the *James*-case proclaimed right that a tribe could assert sovereign immunity to refuse to honor a federal subpoena, in connection with a federal prosecution under 18 U.S.C. 1153, of an on-reservation State crime and held that this obviously means that tribes also have the right to assert tribal sovereign immunity in order to bar a search pursuant to a State (not federal), search warrant (not subpoena), issued in connection with a State (not federal), prosecution or investigation under State law (not 18 U.S.C. 1153), to search for evidence of off-reservation (not on-reservation), State crime.

Thus, the Ninth Circuit's analysis jumps from allowing tribal prohibition of federal subpoenas regarding State crime prosecution by the federal government for on-reservation crime; through tribal prohibition of federal search warrants regarding State crime prosecution by the federal government for, apparently, both on-reservation and off-reservation crime; and then to tribal prohibition of State search warrants regarding State crime prosecution by the State for off-reservation crime.

The Ninth Circuit's opinion in this case is so broad that it includes within its prohibitions searches, pursuant to a search warrant, of tribes and their casinos and other businesses in Public Law 280 States (18 U.S.C. Section 1162), by State law enforcement officers investigating

on-reservation State crimes. In Public Law 280 States, of course, congress has statutorily returned State criminal law jurisdiction on the reservation to the States identified in the statute. California is one of the States identified in the statute.

In summary, the decision of the Ninth Circuit in this case has such far reaching consequences, and is of such national importance, that the rule of law regarding immunity from search pursuant to search warrant must be settled by this Court.

There are nine Western states, along with Guam and the Northern Mariana Islands, now known to be geographical areas where tribal storage of books, records, and other evidence and instrumentalities of crime are protected from search by law enforcement investigators, even when a search warrant has been obtained. At present, such storage is subject only to whatever private arrangements might be made with the managing personnel of the tribe storing the same.

This state of affairs cannot, respectfully, be allowed to stand. A society that declines to protect itself and its citizens from off-reservation (as well as on-reservations) crimes, by establishing hundreds of enclaves which may be used as sanctuaries for criminal evidence, will not long survive as one supported by its citizens.

There is no precedent calling for or supporting the Ninth Circuit's extension of the doctrine of tribal sovereign immunity to enable tribes, their gambling casinos and other businesses to prohibit searches of their property for evidence of off-reservation crimes, especially when that search is pursuant to a search warrant issued upon probable cause.

It is respectfully urged that this petition be granted, and this important question of federal law be settled by this Court.

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH RELEVANT DECISIONS OF THIS COURT.

Additionally, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. These include *Nevada v. Hicks,* 533 U.S.353 (2001), the "Montana analysis" as presented in *Montana v. United States*, 450 U. S. 544 (1981), and *United States v. Wheeler*, 435 U.S. 313 (1975).

Petitioners Inyo County, Mr. McDowell and Sheriff Lucas filed their answering brief with the Ninth Circuit in this case on June 21, 2001. This was just four days prior to this Court's decision in *Nevada v. Hicks, supra*.

In their pre-*Nevada v. Hicks*, brief, petitioners argued extensively that the correct framework for decision in this matter was the analysis set forth in *Wheeler* and *Montana supra*, and the line of cases related thereto. Petitioners argued that the inherent sovereignty of Indian tribes is limited, and quoted the following:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty'... Their incorporation within the territory of the United States and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978)

> "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by [1] treaty or [2] statute, or [3] by implication as a necessary result of their dependent status. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209." *United States v. Wheeler, supra,* 323.
>
> "These limitations [of sovereignty] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. _____ (2001), at p. 5 of the Opinion of the Court; *United States v. Wheeler, supra,* 326; *Montana v. United States, supra*, 564.
>
> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. *Montana v. United States, supra*, 564; *United States v. Wheeler, supra*, 326.
>
> "Although physically within the territory of the United States and subject to ultimate federal control, [Indian tribes] ... remain 'a separate people, with the power of regulating their internal and social relations.' *United States v. Kagama, supra*, 118 U.S., at 381-382...." *United States v. Wheeler, supra*, 322 .
>
> "... Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with

the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 ...; *United States v. Kagama*, 118 U.S. 375, 381-382...." *Montana v. United States, supra,* 564.

"... The powers of self-government [of Indian tribes] ...involve only the relations among members of a tribe." *Montana v. United States, supra,* 564 (Emphasis by Court); *United States v. Wheeler, supra*, 326.

"... the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status." *Oliphant v. Suquamish Indian Tribe, et al., supra,* 208 (1978).

"Indian reservations are 'a part of the territory of the United States.' [Citation.] Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority.' [Citation.] Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v.*

Suquamish Indian Tribe, et al., supra, 208-209 (1978). (Emphasis added.)

In their pre-*Nevada v. Hicks* brief to the Ninth Circuit, petitioners went on to state that when applying the foregoing principles of inherent sovereignty to the question in this case, which is whether the Paiute-Shoshone have retained sovereignty to enable them to bar the execution of a search warrant for evidence pertaining to crimes against the people of the State of California (here, again, theft of public funds), it was respectfully urged that it was clear that the Paiute-Shoshone did not have such retained sovereignty.

Then, four days after petitioners' filed their answering brief, this Court released the decision in *Nevada v. Hicks, supra*, which employed the same analysis of *Montana* and *Wheeler* as did petitioners to reach the conclusion that States have the inherent jurisdiction to enter a reservation, for criminal law enforcement purposes, regarding crimes committed off the reservation, and to serve process (specifically search warrants) in connection therewith.

The Supreme Court stated in *Hicks*:

"[T]he principal that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.' *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069 . . .

* * * *

"While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation

(including Indian fee lands) for enforcement purposes, several of our opinions point in that direction . . . .

* * * *

"We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations - to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Nevada v. Hicks*, 533 U.S. 353, 364. (emphasis added)

The forgoing analysis and holding of the Supreme Court was brought to the attention of the Ninth Circuit in written briefing prior to oral argument, and was even addressed by Paiute-Shoshone in its reply brief. *Nevada v. Hicks* was also specifically brought to the attention of the Ninth Circuit at oral argument. Notwithstanding this, however, the Ninth Circuit declined to address or even mention *Nevada v. Hicks* in its opinion (App., 9a-43a).

In fact, in its opinion, the Ninth Circuit appears, at least to petitioners, to hold directly contrary to the Supreme Court in *Nevada v. Hicks*, when the Ninth Circuit holds:

> "We conclude that the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own

> laws and be ruled by them.'" (emphasis added) (App., 20a).

The Ninth Circuit then asserts that *United States v. James, supra*, 980 F.2d 1314 (9th Cir. 1992), affirming the quashing of a federal subpoena, is authority for this holding. Again, there is no attempt to reconcile or distinguish *Nevada v. Hicks*.

Subsequently, in their petition for rehearing *en banc* to the Ninth Circuit, petitioners presented extensive briefing on *Nevada v. Hicks,* and on the *Montana* analysis leading to the *Hicks* decision. The Ninth Circuit was also briefed on the statements made by the Supreme Court in *Hicks* at page 365 of the decision, that although the states' inherent jurisdiction on reservations could be stripped by Congress, that has not happened with regard to the service of search warrants for criminal evidence pertaining to off-reservation crime, and further, that:

> "Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation." *Nevada v. Hicks, supra,* page 366.

The Ninth Circuit was also briefed on the Supreme Court's holding that:

> "'[T]he State's interest in execution of process is considerable' enough to outweigh the tribal interest in self-government' even when it relates to Indian-fee lands.'" *Nevada v. Hicks, supra*, page 370;

and that:

> "We do not say State officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Nevada v. Hicks, supra,* page 373. (emphasis added)

Despite this extensive briefing, however, once again, in its decision to deny the rehearing *en banc*, and otherwise amend its prior opinion, the Ninth Circuit declined to comment upon the holdings of *Nevada v. Hicks*.

By way of the foregoing, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, the Court should grant the petition herein, and address the issue of the propriety of service of search warrants on Indian tribes, their gambling casinos and other tribal businesses.

III. THE DECISION BELOW IS INCORRECT.

The opinion of the Ninth Circuit is incorrect in several key areas with respect to the questions presented by this petition.

A. Incorrect on Search Warrant Issue.

1. States have inherent jurisdiction to serve process on the reservation with regard to off-reservation State crimes.

As discussed above, in *Nevada v. Hicks, supra*, this Court recognized that States have inherent jurisdiction to serve process (search warrant) upon a reservation with regard to off-reservation crimes, and that congress has not taken this jurisdiction away. Specifically, the Court stated:

> "The States' inherent jurisdiction on reservations can of course be stripped by Congress, *see Draper v. United States*, 164 U.S. 240, 242-243, 17 S.Ct. 107, 41 L.Ed. 419 (1896). But with regard to the jurisdiction at issue here that has not occurred ... Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. To the contrary, 25 U.S.C. § 2806 affirms that 'the provisions of this chapter alter neither ... the law enforcement, investigative, or judicial authority of any ... State, or political subdivision or agency thereof....'"
>
> *Nevada v. Hicks, supra,* 365-366.

Accordingly, the Ninth Circuit is in error by failing to similarly recognize this inherent jurisdiction of the States.

2. The Supreme Court has held that execution of a search warrant upon a reservation, with regard to evidence of off-reservation State crimes, does not infringe upon a tribe's right to self-governance.

The Ninth Circuit held in its opinion that the execution of a search warrant against the tribe interfered with "the right of reservation Indians to make their own laws and be ruled by them." (App., 20a).

However, the Supreme Court has held that:

> ". . . tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations - to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Nevada v. Hicks*, 533 U.S. 353, 364.

There is, of course, a factual distinction in the *Hicks* case, when reviewed in light of the Ninth Circuit's opinion below. That distinguishing fact is that in *Hicks*, the search warrant was served at the on-reservation residence of a tribal member, and in this case, the search warrant was served at the tribe's on-reservation commercial gambling casino.

However, given that (1) this Court has declared that there is no "tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws," and (2) that States have inherent jurisdiction to do so, and that such jurisdiction has not been taken away by congress, and (3) that heretofore tribal sovereign immunity (to suit) has never been extended so as to enable a tribe to prohibit the search of its property for criminal evidence of off-reservation State crime, it is submitted that there is no tribal sovereign immunity to bar law enforcement's search, pursuant to search warrant, of tribal and tribal casino and other business property, for criminal evidence of off-reservation (or on-reservation, for that matter) State crime.

B. Incorrect on Holding that Tribe as a Sovereign has Actionable claim Under 42 U.S.C § 1983.

1. <u>The tribe, as a sovereign and in its sovereign capacity, is not a "citizen or other person", Under 42 U.S.C. § 1983.</u>

The tribe is of course suing as a sovereign. Indeed, it's whole suit is based on asserted tribal sovereignty immunity. The Ninth Circuit has recently acknowledged that a tribe is not a citizen of any state of the United States. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1092, 1096-1097 (9th Cir. 2002). In that case, the Ninth Circuit also cited with its approval the opinion of Ninth Circuit Judge Betty Fletcher in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16, (9th Cir 1987) that:

> **"[I]t is doubtful whether [a] Tribe qua sovereign would qualify as a 'citizen of the United States or other person' eligible to bring an action under § 1983 for deprivation of rights, privileges or immunities. [citations.]"** *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir 1987); *American Vantage Companies, Inc. v. Table Mountain Rancheria, supra*, n. 4, 1097. (emphasis added)

The tribe, as a sovereign and in its sovereign capacity (which is clearly the capacity in which it brings this suit and asserts sovereign immunity) is not a citizen or other person within the meaning of 42 U.S.C. § 1983, and therefore it does not qualify as a "citizen or other person" eligible to bring an action under 42 U.S.C. § 1983.

2. The rights of the tribe allegedly violated - the right to self governance, and to tribal sovereign immunity - are not constitutional or federal statutory rights, and thus any violation of them would not support a cause of action under 42 U.S.C. § 1983.

Neither the right to self-governance, nor the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are statutory or constitutional rights. As such, they cannot support a Section 1983 claim. This is because it is well established that in order to prevail in a Section 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Ninth Circuit has already acknowledged this in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), where the Ninth Circuit holds that interfering with or impairing an Indian tribe's right to self-governance is not a protected interest under Section 1983, and will not support a claim for Section 1983 damages. This is, again, because a tribal right to self-governance is not based upon federal constitutional or statutory law.

The Ninth Circuit attempts, however, in its opinion below, to "bootstrap" the service of the search warrant into a Fourth Amendment violation, that in turn supports a § 1983 claim, by stating that since the search was unlawful as a violation of tribal sovereign immunity (which will not support a § 1983 claim), it was an unlawful search, and therefore, it was a Fourth Amendment violation, that in turn supports a § 1983 claim.

However, even accepting the panel's view that the search was unlawful, the only thing that makes the search

unlawful (for it was with search warrant, and there was probable cause for its issuance, etc.) is that the search was made in violation of the alleged "primary right" of tribal sovereign immunity, or the right to self governance, neither of which itself will support a § 1983 claim.

3. California law does enable the issuance of a search warrant by a superior court judge or other magistrate for a search of property outside the jurisdiction of the county where the magistrate sits.

Finally, the Ninth Circuit is incorrect in its explanation that California law prohibits a magistrate from issuing a search warrant for a search outside of the county where he/she sits (and in any event, it is not disputed that the Paiute Palace Casino is in Inyo County).

California Penal Code § 1528 permits the magistrate to issue a search warrant to "a peace officer in his or her county" which includes, of course the County Sheriff or his deputies or District Attorney Investigators who are peace officers (such as in the case here).

Further, the California Supreme Court has held, after a complete examination and analysis of Penal Code §§ 1528, 1529, 830.1, and other applicable statutes, that a magistrate has jurisdiction even to issue an out-of-county search warrant when he/she "has probable cause to believe that the evidence sought relates to a crime committed within his county." *People v. Fleming* (1981) 29 Cal.3d. 698, 703-706.

The Fleming Court further held that pursuant to Penal Code § 830.1, the authority of the peace officer "extends to any place within the state ... [a]s to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him." *People v. Fleming, supra*, page 704.

Thus, contrary to the believe of the Ninth Circuit, there is no extraterritorial jurisdiction being asserted by the Sheriff, or District Attorney Investigator, all of whom are peace officers employed by the County of Inyo, and whose authority extends to "any place within the state" with regard to the grand theft crime committed, or for which there was probable cause to believe had been committed, in Inyo County.

C. Incorrect in Denial of Qualified Immunity Defense to District Attorney and Sheriff - The Law, if it is Held to Exist, Prohibiting the Execution of Search Warrants on Tribal Property, was not Clearly Established so as to Deny the Defense of Qualified Immunity.

Finally, with regard to the Ninth Circuit's denial of the defense of qualified immunity, it is, as previously stated, well established that in order to prevail in a § 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). If there is no such clearly established right, the officer is entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, even if there was § 1983 cognizable violation of a tribe's right to self-governance or tribal sovereign immunity be free from search, such right was not so clearly established so as to deny the defense of qualified immunity.

The following serve as examples of the state of the law re search warrants and subpoenas regarding Indian tribes at the time of the execution of the warrant in this case: In *Crow Tribe of Indians, et al. v. Racicot, et al.*, 87 F.3d 1039 (9th Cir. 1996), the service of a search warrant upon the Crow Tribe's casino was challenged and upheld as lawful; in *United*

States v. James, 980 F.2d 1314 (9th Cir. 1992), the service of a FRCRP 17 subpoena by a defendant to his alleged rape victim was quashed as being in violation of the tribe's sovereign immunity; in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, the District Court refused to follow *James*, finding that the constitutional rights of the accused were not considered in *James*, and that the constitutional rights of the accused outweighed the tribe's claim of sovereign immunity in the counseling records, and the subpoena was not quashed; and in *United States v. Verlarde,* 40 F.Supp.2d 1314 (D. New Mexico 1999), once again under almost identical circumstances as *James*, the court again went through an extensive analysis of *James* and *Snowden*, and found that the constitutional rights of the accused, and the federal government's overriding sovereign authority, "trumped" the tribe's claim of sovereign immunity in the counseling records, and once again the subpoena was not quashed.

Further, all of these cases, leading to inconsistent results, were similar in that they all involved alleged violations of federal and/or state law occurring on the reservation. This would be confusing enough to a peace officer on the street; let alone add the fact that there was no case that, like this one, addressed the issue of off-reservation State crime.

Under these varied circumstances, it respectfully and simply cannot be said that all reasonable officers would have known that obtaining and/or execution of a search warrant, issued by a magistrate on probable cause, was unlawful under the circumstances alleged.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15007

[Filed May 20, 2002]

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; Bishop Paiute Gaming Corporation, d.b.a. the Paiute Palace Casino,

Plaintiffs-Appellants,

v.

COUNTY OF INYO; Phillip McDowell, individually and in his official capacity as District Attorney of the County of Inyo; Daniel Lucas, individually and in his official capacity as Sheriff of the County of Inyo,

Defendants-Appellees.

Before: PREGERSON and RAWLINSON, Circuit Judges, and WEINER,[1] District Judge.

ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND THE SUGGESTION FOR REHEARING EN BANC

The opinion filed January 4, 2002, 275 F.3d 893 (9th Cir. 2002), is amended as follows:

Starting at page 910, delete Section VII in its entirety and replace it with the following:

VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against county officers sued in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 25-27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Demery v. Kupperman,* 735 F.2d 1139, 1146 n. 3 (9th Cir. 1984).

The District Court correctly held that neither the District Attorney nor the Sheriff are entitled to absolute immunity. However, the District Court erroneously concluded

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[1] Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

that the District Attorney and Sheriff were entitled to qualified immunity.

Qualified immunity "shields [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305, 513 U.S. 1142, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Our analysis of whether the defendants are entitled to qualified immunity follows a two-part test: (1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and, if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful. *See Robinson v. Solano County,* 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc) (citing Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001)). We conclude, taking the facts in the light most favorable to the Tribe, that the search violated the Fourth Amendment, and that the law in this Circuit was clearly established at the time the search was executed such that it would have been clear to the District Attorney and Sheriff that their conduct was unlawful.

The Tribe has alleged a violation of the Fourth Amendment based on the District Attorney's and Sheriff's execution of a search warrant to seize tribal property (employee records) on tribal land. The Tribe contends that the search was unlawful because it was executed beyond the

District Attorney's and Sheriff's jurisdiction. James is the leading case in our Circuit involving seizure of tribal property. *United States v. James,* 980 F.2d 1314 at 1319. In James, we held that a U.S. district court did not err when it quashed a subpoena ordering a tribe to release its documents because the tribe possessed tribal immunity. *Id.* Our holding in James was based on the conclusion that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the [federal] court ...." *Id.* Accordingly, we found no "jurisdictional grant" from Congress which would require the tribe to produce documents in a criminal prosecution against an individual Indian.[2]

In James, we did not need to reach the issue whether the subpoena was lawful because it was never executed. Instead, we affirmed the district court's decision not to enforce the subpoena on the ground that the officers had no jurisdictional authority over the tribe. *James,* 980 F.2d 1314. In the present case, the search warrant was executed but, as in James, the officers still had no jurisdictional authority to do so. Thus, based on the principles set forth in James, we conclude that the search warrant was in violation of the Fourth Amendment because the officers acted beyond their

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[2] In James, the federal officers had authority to prosecute an individual Indian for violations of federal criminal laws under 18 U.S.C. § 1153. In the instant case, the county officers had authority to prosecute the individual Indians for violation of state welfare laws under Public Law 280. Under neither of these statutes did prosecutorial jurisdiction extend to tribes as sovereign entities. *See* Sect. B.II.

authority when they executed the search warrant against the Tribe and in excess of their jurisdiction.

Whether the execution of a search warrant against tribal property is constitutional was addressed in *Sycuan Band of Mission Indians v. Roache,* 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd on other grounds, 54 F.3d 535, 543-44 (9th Cir. 1995). In Sycuan Band, the San Diego County Sheriff's deputies executed a search warrant on the Sycuan, Barona, and Viejas Reservations and seized gaming devices, cash, and records owned by the tribes. *Sycuan Band,* 788 F. Supp. at 1501.[3] The district court held that the search warrants were invalid because the state did not have jurisdiction over the tribes and "the defendants, therefore, acted beyond their authority by executing the ... search warrants." *Id.* at 1508. In reaching its conclusion, the district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction." *Id.* (citing *United States v. Strother,* 188 U.S. App. D.C. 155, 578 F.2d 397, 399 (D.C. Cir. 1978)).

Our conclusion that the county officers' conduct was in violation of the Fourth Amendment is buttressed by a

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[3] As in the present case, the search warrant was executed against the tribes in order to obtain information as part of a criminal investigation against individual Indians. In Sycuan Band and the present case, the officers had authority to enforce criminal law against individual Indians under Public Law 280, but did not have authority to enforce those criminal laws against tribes as sovereign entities.

closely analogous case from the Tenth Circuit. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), a county sheriff executed a search warrant on tribal property. The court held that because it was undisputed that the property was on tribal land and the state had never obtained jurisdiction over such lands, the search warrant was in violation of the Fourth Amendment. *Id.* at 1147.

In light of James and Sycuan Band, and the Tenth Circuit's conclusion in Baker, we hold that the District Attorney and Sheriff violated the Fourth Amendment when they executed the search warrant to seize tribal property held on tribal land because both the Tribe's property and land were outside the District Attorney's and Sheriff's jurisdiction. We further hold that this Fourth Amendment violation may merit relief under § 1983.[4]

Having concluded that the Tribe has alleged a violation of the Fourth Amendment, we turn to consider whether it would have been clear to the District Attorney and

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[4] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed in excess of the county officers' jurisdiction, is not precluded by *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. The present case involves protection from an unlawful search and seizure. Here, the county officers had no jurisdiction to execute the search warrant and seize tribal property and, therefore, the search warrant violated the Fourth Amendment.

Sheriff at the time the warrant was executed that their conduct was unlawful. The conduct occurred in 2000, and so the law at that time must be our guide. *Robinson*, 278 F.3d at 1015.

As the foregoing discussion reflects, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that there was no jurisdictional grant authorizing county officers to search and seize tribal property as part of a criminal prosecution of an individual Indian. *See James*, 980 F.2d at 1319. Indeed, the only court in this Circuit to address the precise question whether the execution of a search warrant against tribal property is constitutional held that it was not. *See Sycuan Band*, 788 F. Supp. at 1508. Moreover, the only circuit to address this issue concluded -- seemingly without debate -- that such a warrant would violate the Fourth Amendment. *See Baker*, 894 F.2d 1144. Accordingly, we find that no reasonable officer could have concluded that he had jurisdiction to search and seize tribal property as part of a criminal prosecution of an individual Indian, and no reasonable officer could have concluded that the lack of jurisdiction was a mere technicality.

We hold as a matter of law that a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction. Thus, the District Attorney and Sheriff are not entitled to qualified immunity.

Ninth Circuit Order Amending Opinion and Denying the Petition for Rehearing and the Suggestion for Rehearing En Banc - 5/20/02

With this amendment, the panel has voted to deny the petition for rehearing. Judges Pregerson and Rawlinson vote to deny the suggestion for rehearing en banc and Judge Weiner so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[January 4, 2002, Filed]

No. 01-15007

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; BISHOP PAIUTE GAMING CORPORATION, d.b.a. the PAIUTE PALACE CASINO,
Plaintiffs-Appellants,
v.
COUNTY OF INYO; PHILLIP MCDOWELL, individually and in his official capacity as District Attorney of the County of Inyo; DANIEL LUCAS, individually and in his official capacity as Sheriff of the County of Inyo,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
D.C. No. CV-00-6153-REC/LJO
Robert E. Coyle, Senior District Judge, Presiding

JUDGES: Before Harry Pregerson and Johnnie B. Rawlinson, Circuit Judges, and Charles R. Weiner,* District Judge. Opinion by Judge Pregerson.

OPINION

PREGERSON, Circuit Judge, On March 23, 2000, the District Attorney for the County of Inyo ("District Attorney") and the Sheriff for the County of Inyo ("Sheriff") obtained and executed a warrant to search Bishop Paiute Gaming Corporation ("Corporation") employee records held in the possession and control of the Bishop Paiute Tribe ("Tribe") in Bishop, California, as part of a welfare fraud investigation. The Tribe and the Corporation brought suit against the County of Inyo ("County"), the District Attorney, and the Sheriff (collectively "Defendants") under federal and state law seeking injunctive and declaratory relief, and damages under 42 U.S.C. § 1983.

The District Court granted Defendants' motion to dismiss on each of the Plaintiffs' claims. On appeal, the Tribe raises several arguments concerning the authority of the County to obtain and execute a search warrant against the Tribe. First, the Tribe argues that Public Law 280--which grants California criminal jurisdiction over offenses committed by or against Indians--does not waive the Tribe's sovereign immunity, and thus the County exceeded its jurisdiction when it obtained and executed a search warrant against the Tribe. The Tribe also argues that the Indian

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* The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Gaming and Regulatory Act preempts any jurisdiction the State of California might have to apply and enforce California's laws against the Tribe. Further, the Tribe argues that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California legislature has not specifically enacted legislation accepting such jurisdiction. Finally, the Tribe asserts that Public Law 280 is invalid because the Tenth Amendment precludes Congress from directing California to assume criminal jurisdiction over Indian lands.

The Tribe also seeks damages under 42 U.S.C. § 1983 on the ground that the County and its agents violated the constitutional and civil rights of the Tribe when the District Attorney and Sheriff knowingly obtained and executed a search warrant in excess of their jurisdiction.

We find that the County and its agents violated the Tribe's sovereign immunity when they obtained and executed a search warrant against the Tribe and tribal property. We also find that the county District Attorney and Sheriff acted as county officers when they obtained and executed a search warrant over tribal property, thus subjecting the County to liability under 42 U.S.C. § 1983. Finally, we find that neither the District Attorney nor the Sheriff is entitled to qualified immunity because they violated clearly established law by executing a warrant outside of their jurisdiction. With respect to these conclusions, we reverse the District Court. With respect to the Tribe's remaining arguments concerning the County's authority to obtain and execute a warrant against the Tribe, we affirm the District Court.

A.

The Bishop Paiute Tribe ("Tribe") is a federally recognized tribe located on the Bishop Paiute Reservation in Bishop, California. The Bishop Paiute Gaming Corporation ("Corporation") is a tribally-chartered corporation wholly owned by the Tribe. The Corporation's sole purpose is to operate and manage Class II and Class III gaming, pursuant to a Tribal-State Compact, and under the legal authority of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. The gaming facility is known as the Paiute Palace Casino ("Casino").

Shortly after February 14, 2000, personnel for the Casino received a request from the County of Inyo District Attorney's Office for records of three tribal member Casino employees. The stated purpose for the records was the County's investigation into alleged welfare fraud. On February 28, 2000, the Tribe's attorney informed the District Attorney that it was the Tribe's long-standing policy that the information requested would not be released unless the Tribe was authorized to do so in writing by the employees whose records were sought.

On March 22, 2000, Leslie Nixon, a peace officer with the District Attorney's Office, executed an affidavit in support of the issuance of a search warrant. The affidavit stated that she had reasonable and probable cause for believing that the employees' records would demonstrate that the three individuals had committed welfare fraud by receiving public assistance while employed. The affidavit stated that the three individuals had received such public assistance through the Inyo County Department of Health and

Human Services during the period of April 1998 through June 1998.

Based on this affidavit, the Inyo County Superior Court issued a search warrant on March 23, 2000 authorizing a search of the Casino for the limited purpose of obtaining payroll records for the three tribal member Casino employees. The search warrant was executed that same day by the District Attorney for the County of Inyo, Phillip McDowell ("District Attorney"), and Sheriff for the County of Inyo, Daniel Lucas ("Sheriff"). Deadbolt cutters were used to cut locks off secured facilities containing confidential personnel records.

The District Attorney and Sheriff seized two types of payroll records: the first consisted of time card entries, payroll registers, and payroll check registers; the second consisted of quarterly payroll tax information which the Tribe had earlier submitted to the State of California in its California State Quarterly Wage and Withholding Reports.

Despite the limited scope of the search warrant, the documents seized contained confidential information concerning seventy-eight other tribal member Casino employees who were not the subject of the warrant, in addition to information concerning the named three individuals. The District Attorney and the Sheriff failed to give the Tribe an opportunity to redact from the seized records this information not specified or identified by the terms and conditions of the search warrant. Additionally, at the time of the search, the Tribe asserted that the state court did not have jurisdiction to enforce a warrant against a sovereign tribe.

Subsequent to July 13, 2000, the Tribe's attorney received correspondence from the District Attorney indicating that the County wished to obtain personnel records for six additional tribal member Casino employees for the period of July 1999 through July 2000. The Tribe's attorney informed the District Attorney that the Tribe would be willing to accept, as evidence of the employees' consent to release the information requested, a redacted copy of the last page of the signed county welfare application which indicated that the employment records of individuals applying for public assistance were subject to review by county officials. This offer was refused by the District Attorney.

The Tribe filed its complaint on August 4, 2000, seeking injunctive and declaratory relief and damages under 42 U.S.C. § 1983. On November 22, 2000, the District Court for the Eastern District of California granted Defendants' motion to dismiss. The District Court reached its decision on the grounds that: (1) the Tribe's sovereign immunity did not prohibit execution of the search warrant against the Tribe; (2) IGRA, which concerns gaming activities, does not preempt Public Law 280; (3) California was not required to enact enabling legislation before Public Law 280 became effective; (4) Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution; (5) the District Attorney and Sheriff acted as state officers and thus the County is not liable for their conduct; and, (6) the District Attorney and Sheriff are entitled to qualified immunity and thus not liable in their personal capacities.

For the following reasons, we reverse the District Court order as to its conclusion that the Tribe's sovereign immunity was not violated by the issuance and execution of

the warrant, and as to the District Court's conclusion that the Tribe was not entitled to damages under 42 U.S.C. § 1983. As to the other conclusions reached by the District Court, we affirm.

B.

I. STANDARD OF REVIEW.

The Tribe challenges the District Court Order granting Defendants' Motion to Dismiss pursuant to Federal Rule 12(b)(6). We review the District Court's dismissal for failure to state a claim de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998) (noting that" a complaint should not be dismissed unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). We review the issue of whether a tribe has sovereign immunity de novo. *Burlington N.R.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991). On review of a denial of a motion to dismiss based on qualified immunity, we have jurisdiction only to decide if defendant's conduct violated clearly established constitutional rights. *Pelletier v. Federal Home Loan Bank,* 968 F.2d 865, 871-72 (9th Cir. 1992).

II. THE SOVEREIGN GOVERNMENTAL STATUS OF THE TRIBE PREVENTS THE EXECUTION OF THE SEARCH WARRANT AGAINST THE TRIBE.

A. Public Law 280 Did Not Waive the Tribe's Sovereign Immunity.

This case requires this court to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations. More particularly, we are asked to determine whether Public Law 280, 18 U.S.C. § 1162(a)--which granted several states criminal jurisdiction and limited civil jurisdiction over reservation Indians--can be read to infringe upon the sovereignty of Indian nations. An analysis of the jurisdictional reach of Public Law 280 necessarily must be taken against the backdrop of the Indian sovereignty doctrine. See *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 475, 48 L. Ed. 2d 96, 96 S. Ct. 1634 (1976).

The Supreme Court's jurisprudence regarding Indian sovereignty is governed by the "policy of leaving Indians free from state jurisdiction and control..." *Rice v. Olson,* 324 U.S. 786, 789, 89 L. Ed. 1367, 65 S. Ct. 989 (1945). The Supreme Court has viewed tribal sovereign immunity as a considerable shield against intrusions of state law into Indian country. See, e.g., *Williams v. Lee,* 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973).

Public Law 280 was adopted by Congress in response to the concern over the lawlessness on Indian reservations. *See Bryan v. Itasca County*, 426 U.S. 373, 379, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976) (citing Carole Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 541-42 (1975). As such, the statute was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations. Section 2 of the statute grants six states, including California, criminal jurisdiction over offenses committed by or against Indians on the reservations.[1] Notably, the statute makes no mention of jurisdiction over Indian tribes.

The denial of state jurisdiction over tribes is also consistent with the Supreme Court's canons of construction for Indian law cases. In interpreting the scope of Public Law 280, the Supreme Court has been "guided by that eminently sound and vital canon... that statutes passed for the benefit of dependent Indian tribes... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 391, 392(citations omitted). Thus, any statutory ambiguity as to whether the State can enforce a warrant against the Tribe should be read to protect Indian sovereignty.

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[1] Section 2(a), codified at 18 U.S.C. 1162(a) provides: "(a) Each of the States... shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country... to the same extent that such State... has jurisdiction over offenses committed elsewhere within the State..., and the criminal laws of such State... shall have the same force and effect within such Indian country as they have elsewhere within the State..."

Reading the plain language of the statute and applying long-established canons of construction relevant to Indian law cases, the United States Supreme Court and the Ninth Circuit have interpreted Public Law 280 to extend jurisdiction to individual Indians and not to Indian tribes. *See Id.* at *389* (interpreting Public Law 280 and observing that "there is notably absent any conferral of state jurisdiction over the tribes themselves..."); *California v. Quechan Tribe of Indians,* 595 F.2d 1153, 1156 (9th Cir. 1979) (stating that "neither the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a Tribe's sovereign immunity"). Absent a waiver of sovereign immunity, tribes are immune from processes of the court.[2]

Nevertheless, Defendants argue that in light of Supreme Court decisions that have described an inherent limitation on tribal sovereignty, Public Law 280 must be read to grant jurisdiction to the states to execute a search warrant over the Tribe. *See, e.g., United States v. Wheeler,* 435 U.S. 313, 323, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978) (holding that an Indian tribe retains jurisdiction to punish one of its members unless withdrawn by treaty, statute or implication as

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[2] The District Court wrongly found that Bryan was inapplicable authority on the ground that the case concerned Public Law 280's grant of civil jurisdiction as opposed to criminal jurisdiction. Because the provisions granting criminal and civil jurisdiction are identical, cases interpreting Public Law 280's provision granting civil jurisdiction are instructive for interpreting Public Law 280's provision granting criminal jurisdiction. Thus, both Bryan and Quechan Tribe provide precedential authority that Public Law 280 does not diminish tribal sovereignty.

a necessary result of their dependent status); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211-12, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) (holding that an Indian tribe's exercise of criminal jurisdiction over non-Indians is inconsistent with the domestic-dependent status of the tribes and that tribes may not assume such jurisdiction without congressional authorization). Defendants assert that because tribes are no longer possessed with the full attributes of a sovereign, it would be inconsistent with their dependent status to bar the state from executing a search warrant against tribal property.

However, all the cases relied upon by Defendants involve instances where a tribe's sovereignty has been limited after it attempted to exert jurisdiction over non-member Indians or in cases involving attempted exertion of jurisdiction over nontribal lands. This case involves the Tribe's assertion of jurisdiction over uniquely tribal property (Casino employee records) on tribal land. Thus, Defendants' assertion that the Tribe's inherent sovereignty has been lost by implication is not supported by law.

In sum, in enacting Public Law 280, Congress neither waived the sovereignty of the tribes, nor granted state jurisdiction over Indian tribes. Accordingly, we hold that Public Law 280 did not confer state jurisdiction over the Tribe.

B. Execution of a Warrant Against the Tribe Violates Tribal Immunity.

Defendants argue that the execution of a warrant against the Tribe does not offend their status as a sovereign

entity. The Tribe responds that their right to develop and enforce their internal tribal policies should be protected.

The Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines. The Tribe asserts that such policies are necessary to encourage truthfulness and accuracy in Casino employee records. As one of the only means by which the Tribe can generate income and be self-sufficient, management of the Casino is uniquely part of the Tribe's government and infrastructure. Indeed, all governments create policies and procedures for the protection of their records. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 *et seq.*; California Public Records Act, CAL. GOV'T CODE § 6250. Undoubtedly, California's sovereign immunity would be compromised if the United States demanded that the State follow procedures other than those adopted by the state policymakers. Moreover, at issue is not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334, 76 L. Ed. 2d 611, 103 S. Ct. 2378 (1983) (noting that "the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government..."). We conclude that the execution of a search warrant against the Tribe interferes with "the right of reservation Indians to make their own laws and be ruled by them." *Williams,* 358 U.S. at 220.

Defendants characterize the execution of the warrant against the Tribe as a "customary inconvenience "that would accompany the service on any business. However, this Circuit

has held that a subpoena issued against a tribe is different and cannot be enforced because of tribal immunity. *See United States v. James,* 980 F.2d 1314 (9th Cir. 1992). In James, the Indian defendant was prosecuted by the federal government for the crime of rape against another Indian pursuant to the grant of federal jurisdiction through the Indian Major Crimes Act, 18 U.S.C. § 1153. The defendant appealed his criminal conviction in part on the ground that the federal district court erred in quashing a subpoena that ordered the Quinault Tribe to release documents in its possession relating to the victim's alcohol and drug problem. *Id.* at 1319. In affirming the district court's order to quash the subpoena, the court noted that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced" when it granted federal criminal jurisdiction over individual Indians for certain crimes pursuant to 18 U.S.C. § 1153. *Id.* at 1319. The court held that the Tribe was possessed of tribal immunity and thus the federal court lacked the jurisdiction to enforce a subpoena against an unwilling sovereign even though the federal government had jurisdiction to enforce federal criminal laws against individual Indians. *Id.* at 1319.

The ruling in James is directly relevant to our review of this case. The James Court correctly focused on the status of Indian tribes as sovereigns and denied the federal government the authority to compel disclosure of tribal documents. That the federal government may not pierce the sovereignty of Indian tribes, notwithstanding its constitutionally preemptive authority over Indian affairs, *see* U.S. CONST. art. I, § 8, carries considerable weight in our review of this case.

The District Court distinguished James on two grounds, neither of which justifies its decision not to follow Circuit precedent. First, the District Court noted without further discussion that the tribe in James was a third party and not directly involved in the criminal proceeding. However, the District Court does not explain why the Tribe's status as Plaintiff in this case affords it any less protection against government intrusion of its sovereignty than was afforded the Quinault Tribe in James. In both James and the case at issue here the tribes were in sole possession of confidential documents that the state or federal government claimed to need for effective prosecution of tribal members. In neither case was the tribe the subject of prosecution. Moreover, both tribes refused to disclose their documents because to do so would violate tribal policies.

Second, the District Court balanced the interests at stake in James, compared them to those in the case at issue, and determined that the Bishop Paiute Tribe's interests were less compelling. However, the District Court offered no authority for the application of a balancing test in the present circumstances. By contrast, the Supreme Court has adopted a more categorical approach denying state jurisdiction where states attempt to assert such jurisdiction over a tribe absent a waiver by the tribe or a clear grant of authority by Congress. *See Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 132 L. Ed. 2d 400, 115 S. Ct. 2214 (1995) (citing *Bryan,* 426 U.S. 373, 48 L. Ed. 2d 710, 96 S. Ct. 2102). Though the rule is not a per se rule, *see California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214 215, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987), cases applying a balancing test have involved state assertions of authority over non-members on reservations and in exceptional

circumstances over the on-reservation activities of tribal members, *see, e.g., Mescalero Apache Tribe,* 462 U.S. at 331-332; Confederated Salish & Kootenai Tribes, 425 U.S. at 480. Because Defendants attempted to assert jurisdiction over the Tribe, and not over individual tribal members or non-members on tribal land, the District Court erroneously applied a balancing test.

However, even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe. In James, the Quinault Tribe asserted sovereign immunity to "protect the Native American victim and to foster confidence in the tribe's Social and Health Services." The James Court held that the protection of tribal sovereignty justified the withholding of tribal documents even though they might be relevant to a federal criminal prosecution. *James,* 980 F.2d at 1319-1320. In the present case, the Tribe asserted sovereign immunity to protect its right to self-government. The enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it effects the Tribe's main source of income. The Tribe, like California or the federal government, has adopted certain polices and procedures regarding its records. These policies promote tribal interests, such as accuracy in tribal records, confidentiality of members' personal information and a trusting relationship with tribal members. The Tribe's employment policies also affect the Casino, the Tribe's predominant source of economic development revenue.

These interests should be weighed against Defendants' interest in investigating potential welfare fraud--something that could be accomplished through far less intrusive means

than infringing on the Tribe's sovereignty. *See infra* pp. 100-101. It is clear that the interests at stake for the Bishop Paiute Tribe are equally as great as those at stake for the Quinault Tribe in James. Moreover, we find that the state's interest in the present case--the prevention of welfare fraud--is not as great as the federal government's interest in the judicious criminal prosecution in James, and it is certainly not as great as protecting the Tribe's sovereign immunity. Thus, this court reaffirms James and holds that the Tribe is possessed of sovereign immunity which bars execution of the warrant.[3]

C. The County and Its Officials Have Other Less Intrusive Means to Investigate Allegations of Welfare Fraud by Tribal Members.

Although Defendants may need to expeditiously enforce California's welfare laws, their interests must yield to the principles of immunity. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513, 60 S. Ct. 653, 84 L. Ed. 894 (1940). Defendants assert that a decision by

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[3] Following principles of comity and this Circuit's jurisprudence, comparison to cases denying enforcement of state court subpoenas against the United States government is also appropriate. *See Quechan Tribe of Indians*, 595 F.2d at 1155 (noting that the "sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"). In *Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997), the Ninth Circuit denied the enforcement of a subpoena against a Forest Service employee, holding that principles of sovereign immunity bar a state court from enforcing a subpoena against the United States.

this court to bar the enforcement of search warrants against tribal governments would hamper state and federal governments in their investigations of criminal conduct on Indian land. The Supreme Court has concluded that even though tribal sovereignty might prohibit the states from conducting law enforcement through the most effective means, other adequate alternatives exist. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991) (noting that "there is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). Thus, the fact that the County has the burden of seeking other methods to obtain the same information does not justify a diminution of the Tribe's sovereign status.

The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer. The Tribe also contends that the County already had evidence of the alleged welfare fraud in its possession. Finally, Defendants had authority, under Public Law 280, to execute a search warrant against the individual tribal members. Such a search would likely uncover relevant documents. The District Attorney's interest in receiving this information through the

processes of the court is no basis to chip away at the Tribe's sovereign status.

III. THE INDIAN GAMING AND REGULATORY ACT DOES NOT PREEMPT PUBLIC LAW 280 AS TO NON-GAMING CRIMES.

The District Court correctly found that IGRA does not preempt Public Law 280 as to non-gaming crimes. IGRA grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country..." 18 U.S.C. § 1166(d). *See United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996). In interpreting the preemptive effect of IGRA, the Ninth Circuit stated that if the federal government's exclusive jurisdiction "is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1995). However, IGRA explicitly concerns gaming operations by Indian tribes. In this case, Defendants were seeking to enforce a warrant as part of an investigation into welfare fraud and not part of allegations of illegal gambling. As the District Court rightly noted, "because the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption."

We affirm the District Court with respect to its rulings that IGRA did not preempt Public Law 280 as to non-gaming crimes.

IV. CALIFORNIA IS NOT REQUIRED TO AFFIRMATIVELY ADOPT PUBLIC LAW 280 IN ORDER TO ASSUME ITS GRANT OF JURISDICTION.

The District Court correctly found that California was not required to enact enabling legislation that assumed jurisdiction before Public Law 280 would become effective in the State. A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 471-72, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979) (explaining that Public Law 280's mandatory criminal jurisdiction "effected an immediate cession of criminal and civil jurisdiction over Indian country" to affected states). Moreover, California law has clearly held that it was "not required that California enact some form of enabling legislation to assume jurisdiction before the terms of [Public Law 280] became effective in this state." *People v. Miranda,* 106 Cal. App. 3d 504, 165 Cal. Rptr. 154, 155 (Cal. Ct. App. 1980). Other circuits have agreed. The Tenth Circuit found that a direct Congressional grant of jurisdiction over Indian land does not require any further action to vest the state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See United States v. Burch,* 169 F.3d 666, 671 (10th Cir. 1999).

We affirm the District Court with respect to its ruling that California was not required to enact enabling legislation before Public Law 280 became effective.

V. PUBLIC LAW 280 DOES NOT VIOLATE THE TENTH AMENDMENT.

The District Court correctly found that Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution. Public Law 280 grants certain states jurisdictional authority to enforce state criminal laws and limited civil laws over individual Indians in Indian country. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). There is no attempt by Congress to mandate state participation in the enforcement of a federal statutory scheme such as in *Printz v. United States,* 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), or to require a state legislature to adopt federal regulations such as in *New York v. United States,* 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). By contrast, this federal grant of authority allows states to exert their own criminal and civil laws upon Indians.

We affirm the District Court with respect to its ruling that Congress did not violate the Tenth Amendment in passing Public Law 280.

VI. THE COUNTY OF INYO SHOULD BE HELD LIABLE FOR THE CONDUCT OF THE DISTRICT ATTORNEY AND SHERIFF IN OBTAINING AND EXECUTING THE SEARCH WARRANT AGAINST THE TRIBE.

Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). A municipality,

however, cannot be held liable on a respondeat superior theory. *Id.* at 691. To hold a local government liable for an official's conduct, a plaintiff must establish that the government official "(1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *McMillian v. Monroe County,* 520 U.S. 781, 785, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997)).

A. California Constitutional and Statutory Law and Case Law Favors a Finding that the District Attorney and the Sheriff Acted as County Officers In Obtaining and Executing the Warrant Against the Tribe.

Whether the Sheriff and District Attorney acted as county officers is governed by the analytical framework set out in *McMillian*. In that case, the Supreme Court held that an Alabama sheriff could not be sued under § 1983 for intimidating witnesses into making false statements and suppressing exculpatory evidence because the sheriff was exercising state authority. In reaching this conclusion, the Supreme Court cautioned against a categorical approach, and instead inquired "whether government officials are final policy makers for the local government in a particular area or on a particular issue." *McMillian,* 520 U.S. at 785. The *McMillian* Court directed its inquiry on an analysis of state law, closely examining the Alabama Constitution, statutes and case law. *Id.* at 786-87.

When determining a county's liability under *McMillian*, the Ninth Circuit has engaged in an "independent analysis of California's constitution, statutes and case law." *Streit v. County of Los Angeles,* 236 F.3d 552, 561 (9th Cir. 2001). The Ninth Circuit has given appropriate deference to a state's legal characterization of the government entities while at the same time recognizing that "federal law provides the rule of decision in section 1983 actions." *Id.* at 560 (citing Regents of the Univ. of *Cal. v. Doe,* 519 U.S. 425, 430 n. 5, 137 L. Ed. 2d 55, 117 S. Ct. 900 (1997).

We apply California law and find that the Inyo County District Attorney and Sheriff were acting as county officers. As in *McMillian*, our analysis must begin with the California Constitution. The *McMillian* Court relied heavily on two provisions of the Alabama Constitution. First, and "especially important for our purposes," is the provision in the Alabama Constitution designating a county sheriff as an executive officer. *McMillian*, 520 U.S. at 787. Under the California Constitution, sheriffs and district attorneys are not designated as members of the executive branch. Instead, sheriffs and district attorneys in California are defined in Article XI of the Constitution, entitled "Local Government." Article XI, section 4 of the California Constitution provides that "County charters shall provide for...an elected sheriff, an elected district attorney..."

The *McMillian* Court also gave weight to the fact that the Alabama Supreme Court had authority to impeach a county sheriff for neglect of office. *Id.* at 788. By contrast, the California Constitution does not list sheriffs or district attorneys in Article IV, section 18, which provides for impeachment of a variety of state officers before the

Legislature. Instead, sheriffs and district attorneys can be removed from office following the accusation of the county grand jury. CAL. GOV. CODE § 3060.

Other provisions under the California Constitution and statutes also weigh in favor of finding the District Attorney and Sheriff to be county officers. California law explicitly states that the district attorney and the sheriff are county officers. CAL. GOV. CODE § 24000(a); § 24000(b). The county board of supervisors set the salaries of both the sheriff and district attorney. CAL. GOV. CODE § 25300. Sheriffs and district attorneys must be registered to vote in their respective counties. CAL. GOV. CODE § 24001. The county has the authority to supervise the sheriff and district attorney's conduct and use of public funds. CAL. GOV. CODE § 25303. Finally, sheriffs in California are required to attend upon and obey state courts only within their county. CAL. GOV. CODE § 26603.

In reaching its conclusion that the District Attorney and Sheriff acted as state officers, the District Court gave primary importance to the supervisory authority of the State Attorney General granted under the California Constitution and state statues.[4] *See* CAL. CONST. art. V, § 13 (providing

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[4] "This provision was added in 1934, when the voters approved Proposition 4. As then Alameda County District Attorney Earl Warren told the voters, this constitutional amendment was designed to 'address the lack of organization of our law enforcement agencies' by providing coordination and supervision by the Attorney General 'without curtailing the right of local self government.'" *See* Roe v. County of Lake, 107 F. Supp. 2d 1146, 1150 (N.D. Cal. 2000) (citing Argument in Favor of Proposition 4

that the Attorney General is to have "direct supervision over every district attorney and sheriff...in all matters pertaining to the duties of their respective offices,..."); CAL. GOV. CODE § 12560 (providing that the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and that he may direct the service of subpoenas, warrants of arrest, or other processes of court); CAL. GOV. CODE § 12524 (providing that the Attorney General can call into conference the sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law); CAL. GOV. CODE § 12550, 12560 (providing that the Attorney General has direct supervision over the sheriffs and district attorneys and may require of them written reports concerning investigations, detection and punishment of crimes in their respective jurisdictions).

However, "supervision by the Attorney General does not alter the status of sheriffs [and district attorneys] as elected county officials." *Brewster v. County of Shasta,* 112 F. Supp. 2d 1185, 1190 (E.D. Cal. 2000); *See also People v. Brophy,* 49 Cal. App. 2d 15, 120 P.2d 946, 953 (Cal. Dist. Ct. App. 1942) (Noting that constitutional oversight does not "contemplate absolute control and direction of such officials... Especially is this true as to sheriffs and district attorneys..."). Moreover, to allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The

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by Earl Warren, District Attorney of Alameda County, 1934 General Election Ballot Pamphlet).

California Constitution grants the Attorney General supervisory authority over all "other law enforcement officers as may be designated by law." CAL. CONST. art. V, § 13. Under this provision, if taken to its logical extreme, all local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in Monell, which preserves § 1983 actions against local governments.

The District Court also accorded significance to the fact that the search warrant was obtained to prevent welfare fraud under the state welfare laws. However, the District Attorney and Sheriff were acting on behalf of the County's Department of Health and Human Services, the governmental entity responsible for the administration of the state's welfare laws, including the investigation of overpayments. See CAL. WELF. & INST. CODE § 10800 (providing that the administration of public social services is "declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties..."). Thus, the fact that state welfare law was at issue does not support a finding that the District Attorney and Sheriff were acting as state officers in their investigation into alleged welfare fraud.

Case law also compels our finding that the District Attorney and Sheriff acted as county officers in obtaining and executing a search warrant against the Tribe.

1. The District Attorney Acted as a County Officer When He Obtained and Executed a Search Warrant Against the Tribe.

In concluding that the District Attorney acted as a state officer, the District Court relied on the California Supreme Court's decision in *Pitts v. County of Kern,* 17 Cal. 4th 340, 949 P.2d 920 (Cal. 1998). In *Pitts*, plaintiffs brought a § 1983 action against the district attorney and county alleging civil rights violations based on misconduct during criminal prosecution. In a thoughtful opinion, the California Supreme Court held that "when preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state..." 949 P.2d at 934. The California Supreme Court, however, recognized the dual roles that a county district attorney performs:

> He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the [county] board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Id. at 932-33 (citing, *Modoc County v. Spencer,* 103 Cal. 498, 37 P. 483, 484 (Cal. 1894)). Using this framework, the California Supreme Court concluded that when a district attorney engages in prosecutorial conduct, he is a state officer, but at other times, he should be characterized as a county officer. *Pitts,* 949 P.2d at 934.

Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has

not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision. In *Fletcher v. Kalina,* 93 F.3d 653, 655 (9th Cir. 1996), the court held that a prosecutor was not entitled to absolute immunity for conduct in preparing a declaration in support of an arrest warrant. In reaching this conclusion, the Fletcher court relied on the Supreme Court's decision in *Buckley v. Fitzsimmons,* 509 U.S. 259, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993). The Supreme Court held in Buckley that a prosecutor is not absolutely immune when he allegedly fabricated evidence during the investigation by retaining a dubious expert witness. *Id.* at 273-75. The Court reasoned that "there is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial,...and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested... " *Id.* at 273 (citations omitted). Because the prosecutor's conduct in Buckley fell within the latter category, the Supreme Court denied absolute immunity. *See* also *Malley v. Briggs,* 475 U.S. 335, 342-43, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) (holding that a police officer who secures an arrest warrant without probable cause cannot assert an absolute immunity defense).

In the present case, the District Attorney was not "preparing to prosecute [or] prosecuting criminal violations," as was the situation in *Pitts*. *Pitts,* 949 P.2d at 934 (emphasis supplied). Instead, the District Attorney was investigating allegations of welfare fraud, conduct more similar to that in

Fletcher. At the time the District Attorney obtained the search warrant, no criminal complaint had been filed against the three tribal members Casino employees whose records were sought--the District Attorney was merely performing his role as "detective." This distinction was recognized and adopted by the District Court when it refused to grant the District Attorney absolute immunity, on the ground that he was engaging in investigatory conduct and not prosecutorial conduct. Finally, the California Penal Code identifies the commencement of prosecution for an offense in only four instances: (a) an indictment or information is filed; (b) a complaint is filed charging a misdemeanor or infraction; (c) a case is certified to the superior court; or (d) an arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. CAL. PENAL CODE § 804. Because the District Attorney had taken none of these actions when he executed the search warrant, we find that the District Attorney was engaging in investigatory conduct more akin to that of a detective.

Relying on Fletcher and Buckley, and recognizing the significant factual distinctions between this case and *Pitts*, we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe.

2. The Sheriff Acted as a County Officer When He Executed a Search Warrant Against the Tribe.

With respect to the Sheriff's conduct, the District Court recognized that the California courts of appeal and federal district courts in this Circuit have reached different conclusions on whether a sheriff is a state or county officer. The majority of the cases cited by the District Court discuss the sheriffs' role in their function as jail administrators. However, since the District Court's ruling, the Ninth Circuit held that California sheriffs, functioning as jail administrators, are county officials. *See Streit,* 236 F.3d at 565. So holding, the court relied heavily on the constitutionally and statutorily defined role of California sheriffs discussed above. *Streit,* 236 F.3d at 561-562; *see supra* p. 105-107.

In support of our conclusion, we also rely on several recent federal district court decisions that hold that the sheriff is properly viewed as a county officer when he investigates alleged criminal conduct. *See Ford v. County of Marin,* 2001 U.S. Dist. LEXIS 10909, 2001 WL 868877 at *8 (N.D. Cal. July 19, 2001) (denying defendants' motion to dismiss on the grounds that the sheriff, when knowingly giving false information to the Housing Authority with the intent of initiating a nuisance lawsuit, did not act as a state officer); *Brewster,* 112 F. Supp. 2d at 1191 (holding that the sheriff, when investigating crimes, acts as a county officer).

Finally, we note persuasive language from the California Supreme Court on how the state's highest court views the role of county sheriffs. *Dibb v. County of San Diego,* 8 Cal. 4th 1200, 884 P.2d 1003 (Cal. 1994). In a case

concerning a county's authority to create a citizen board to oversee the Sheriff's Department, the court noted that "the operations of the sheriff's...departments and the conduct of employees of that department are a legitimate concern of the [county] board of supervisors." 884 P.2d at 1008.

Based on the foregoing, we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe.

B. The District Attorney and Sheriff Have Final Decision Making Authority to Obtain and Execute a Search Warrant.

There is no dispute that the District Attorney or Sheriff have final decision making authority to obtain and execute search warrants for the County of Inyo.

VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against state officers sued in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 25-27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *Demery v. Kupperman,* 735 F.2d 1139, 1146 n. 3 (9th Cir. 1984).

The District Court correctly held that neither the District Attorney nor the Sheriff are entitled to absolute immunity. However, the District Court erroneously concluded

that the District Attorney and Sheriff were entitled to qualified immunity.

Qualified immunity "shields [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Our analysis of the question whether the defendants are entitled to qualified immunity follows a two part test: "1) we ask whether the law governing the official's conduct was clearly established; 2) if so, we ask whether, under that law, a reasonable officer could have believed the conduct was lawful." *Robinson v. Solano County,* 218 F.3d 1030, 1034 (9th Cir. 2000).

A. A Reasonable Officer Executing a Search Warrant Against a Tribe At the Time the County Officers Executed the Search Warrant Against the Bishop Paiute Tribe Would Know that He is Acting Outside of His Jurisdiction and In Violation of The Fourth Amendment.

In order for a right to be "clearly established "its "contours must be sufficiently clear that [at the time of the alleged conduct] a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The Supreme Court recently held that a "media ride-along" when the police delivers a warrant violates the Fourth Amendment, but because the state of the law was not clearly

established at the time the case took place, the officers were entitled to qualified immunity. *Wilson v. Layne,* 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). The Supreme Court refused to hold the officers liable because "petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely." *Wilson,* 526 U.S. at 617.

By contrast, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that a search warrant cannot be executed on tribal property. *See James,* 980 F.2d at 1319. The law was also clear that county officers act beyond their jurisdiction when they issue and execute search warrants on tribal property. *See Sycuan Band of Mission Indians v. Roache,* 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd, 54 F.3d 535, 543-44 (9th Cir. 1995).

In Sycuan Band of Mission Indians the district court held that county sheriffs acted beyond their authority by executing a search warrant for property within Indian reservations, over which the state never obtained jurisdiction. 788 F. Supp. at 1508. The district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction," and concluded that the search warrant was invalid because the state had no jurisdiction over the reservation to enforce its laws. *Id.* (citing *United States v. Strother,* 188 U.S. App. D.C. 155, 578 F.2d 397, 399 (D.C. Cir. 1978)). The court also relied on California law, which indicates that the defendants acted beyond their authority by executing the warrants on the reservations. *Id.* California Penal Code § 830.1 defines the territorial limitations of peace

officers, including sheriffs and their deputies, in enforcing the law. The peace officers's authority extends to "any public offense... within the political subdivision which employs" the sheriff. If the sheriff acts outside this territorial jurisdiction, the sheriff has no law enforcement powers other than those that any private citizen would have. (*See People v. Pina,* 72 Cal. App. 3d Supp. 35, 140 Cal. Rptr. 270, 272 (Cal. App. Dep't Super. Ct. 1977)). The court concluded, therefore, that because the reservations at issue were not within the political subdivision which employed the sheriff or his deputies, the defendants acted beyond their authority by executing the search warrants. *Id.*[5]

In light of James and Sycuan Band of Mission Indians, we hold as a matter of law that a reasonable county officer, executing the search warrant on tribal property at the time the search warrant was executed against the Bishop Paiute Tribe, would have known that the search warrant was being executed

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[5] The Tenth Circuit has also addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker,* 894 F.2d 1144 (10th Cir. 1990), state authorities executed a search warrant on a tribal reservation. The Tenth Circuit concluded that the search warrant was invalid, and therefore the evidence should have been suppressed, because the state had no jurisdiction over the reservation to enforce its laws--including the execution of a search warrant--unless Congress consented to the state's jurisdiction. *Id.* at 1147. *See also Ross v. Neff,* 905 F.2d 1349, 1354-55 (10th Cir. 1990) (holding that the arrest of an Indian on Indian land was illegal because the state had no jurisdiction over the reservation to enforce its laws--including the execution of a search warrant--unless Congress consented to the state's jurisdiction).

outside of his jurisdiction and thus in violation of the Fourth Amendment. We further conclude that the execution of a search warrant beyond a county officer's jurisdiction is actionable under § 1983.[6]

C.

In sum, the District Court order granting Defendants' motion to dismiss is reversed in part and affirmed in part. Public Law 280, by its terms, legislative history, and analysis in case law, does not confer criminal jurisdiction to the states over sovereign Indian tribes. Thus, the County did not have jurisdiction to execute a search warrant against tribal property. We also reverse the District Court's decision to deny Plaintiff's § 1983 action, on the ground that the District Attorney and Sheriff acted as state officers, and not county officers, when obtaining and executing the search warrant on tribal property. Furthermore, we reverse the District Court's grant of qualified immunity to the District Attorney and Sheriff because the execution of a warrant in excess of county officers' jurisdiction violates the Fourth Amendment.

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[6] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed against tribal property, and therefore executed in excess of the county officers' jurisdiction, is not precluded by *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. In this case, we conclude that a search warrant executed in excess of the county officers' jurisdiction violates the Fourth Amendment and is therefore actionable under § 1983.

We affirm the District Court's decisions that: (1) IGRA does not preempt Public Law 280, (2) California did not need to enact enabling legislation before it could properly exercise jurisdiction under Public Law 280, and (3) Public Law 280 does not violate the Tenth Amendment.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV-F-00-6153 REC LJO

[Filed November 22, 2000]

BISHOP PAUITE TRIBE and
BISHOP PAUITE GAMING CORPORATION
d.b.a. PAUITE PALACE CASINO
Plaintiffs,

v.

COUNTY OF INYO, PHILLIP MCDOWELL, individually and in his official capacity, and DANIEL LUCAS, individually and in his official capacity,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On October 30, 2000 the court heard defendants' Motion to Dismiss. Upon due consideration of the written and oral arguments and the record herein, the court grants the motion for the reasons set forth herein.

I. Plaintiffs' Allegations

Plaintiffs allege five claims in the Complaint. In the first claim, plaintiffs aver that some time after February 14, 2000, the Inyo County District' Attorney's office requested the Paiute Palace Casino to provide it with payroll records for three casino employees-- Patricia Dewey, Clifford Dewey and Tinya Hill -- all members of the Bishop Paiute Tribe. Complaint, ¶¶ 17 & 19. The request related to an investigation then being undertaken by the district attorney's office into potential welfare fraud. *Id.* at ¶ 17. In response to the request, the casino informed the district attorney's office that it was Plaintiff's long standing custom, practice and policy not to provide the records unless it got written authorization to do so from the three employees. *Id.* Thereafter, on March 23, 2000, the district attorney's office obtained a search warrant for the records. *Id.* at ¶ 18. Plaintiffs further allege that the search was executed with the assistance of the Sheriff's Department for the County of Inyo, by use of force and intimidation. *Id.* at ¶ 21. Deadbolt cutters were used to cut the locks off of the storage facility where the confidential personnel records were stored. *Id.* The records allegedly were not limited to the individuals identified in the search warrant but also included the personnel records of seventy-eight other employees who were not subject to criminal investigation. *Id.*

Plaintiffs' also allege that the search warrant is unlawful because it infringed upon plaintiffs' right to remain free from state interference with their right to self-governance as proscribed by federal law. *Id.* at ¶ 28. Plaintiff contend that Public Law 280 does not permit the defendants to execute a search warrant covering casino property. *Id.* Plaintiffs seek

declaratory relief against all defendants, declaring that Public Law 280 does not allow for the issuance and execution of search warrants upon casino property.

The second claim is also a request for declaratory relief. Plaintiffs allege that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, preempts whatever jurisdiction the State of California otherwise might have to directly apply and enforce California laws against plaintiffs and their officers, agents, employees, contractors and patrons in any manner within the Pauite Palace Casino. *Id.* at ¶ 29. In addition, plaintiffs allege that the Tribal-State Compact allows the state's access to the records solely to ensure the compliance of the compact. *Id.* at ¶ 30-31.

The third claim alleges a section 1983 claim. Plaintiffs aver that in obtaining and executing the search warrant, District Attorney Phillip McDowell and Sheriff Dan Lucas acted willfully, knowingly and with specific intent to deprive plaintiffs of their constitutional rights and rights under the IGRA. *Id.* at ¶ 38. Plaintiff also alleges that defendant McDowell acted consistently with the policies of the County of Inyo. Plaintiff request monetary damages and attorney's fees.

Plaintiffs' fourth claim seeks an injunction against the County, District Attorney McDowell, Sherif Lucas and their deputies and subordinates to enjoin them from obtaining additional search warrants to obtain employment records in connection with other fraud investigations. *Id.* at ¶¶ 22, and 41-42.

The fifth claim seeks declaratory relief in connection with a request for supplemental jurisdiction under 28 U.S.C. 1367(a). *Id.* at ¶ 44. Plaintiffs allege that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California Legislature has not specifically enacted legislation accepting such jurisdiction. *Id*, at ¶¶ 45-48. Alternatively, plaintiffs seek a declaratory judgment that Public Law 280 is invalid because the Tenth Amendment precludes Congress from directing California to assume criminal jurisdiction over Indian lands. *Id.* at ¶ 52.

II. Motion to Dismiss under Fed. R. Civ. p. 12(b) (6)

A. Standard

Under Rule 12(b) (6), "dismissal for failure to state a claim is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' "*Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). Rule 12(b)(6) should be read in conjunction with Rule 8 (a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1355-56 (1990). Moreover, a court "must accept all material allegations in the complaint as true, and construe them in the light most favorable [to the plaintiff]." *NL Industries v. Kaplan*, 792 F.2d 896 (9th Cir. 1986).

In addition, unless a Rule 12 (b)(6) motion is converted to a motion for summary judgment, "evidence outside the pleadings ... cannot normally be considered in

deciding a 12(b) (6) motion." *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). However, a court may consider material submitted as part of the complaint and take judicial notice of facts outside the pleadings. *Hal Roach Studios v. Richard Fiener & Co.*, 896 F.2d 1542, 1554 n.19 (9th Cir. 1990); *Mack v. South Bay Beer Distribs., Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986). Furthermore, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (documents referred to in complaint but not attached to complaint may be considered by trial court for Rule 12(b) (6) motion); *Parrino v, FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). Where claims in the complaint are made based on documents, the documents are no longer matters outside the pleadings but are part of the record. *Townsend v. Columbia Operations,* 667 F.2d 844, 848 (9th Cir. 1982).

B. Judicial Notice

Under Federal Rule Evidence 201(d), the court shall take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

In connection with its motion to dismiss, defendants req/lest judicial notice of the following: (1) the search warrant

affidavit; (2) the search warrant; (3) the return to the search warrant; (4) the State of California IEVS/Integrated Fraud Detention System report; (5) the documents obtained in the search warrant; (6) the Deed to the casino execution of property; (7) the Tribal-State Compact; and (8) notice of the approval of the Compact in the Federal Register.

The documents are specifically referred to in the Complaint and its authenticity is not questioned by either parties. Moreover, the documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned because they are official records and documents. Thus, the court takes judicial notice of the documents.

C. Section 1983 Claim

1. County of Inyo

Defendants contend that plaintiffs' section 1983 claim[1] against the County of Inyo should be dismissed because the County is not liable for the acts of the district attorney and sheriff in the performance of their official prosecutorial, investigative and law enforcement duties.

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[1] 42 U.S.C. section 1983 provides: Every' person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

A local government may not be sued under § 1983 for constitutional torts inflicted by its employees or agents unless a plaintiff can show that his injury was the result of the government's policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). There is no respondeat superior liability under section 1983. *Id.* at 692. "To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000) (quoting *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 785 (1997)). The court's determination of whether the official is acting for the state or the county is dependent on an analysis of state law based on the state's constitution, statutes and case law. *McMillian*, 520 U.S. at 785, 787-93.

Under the California Constitution, both the sheriff and the district attorney have dual roles as agents for the state and the county. Article XI, section l(b) states that "the Legislature shall provide ... an elected county sheriff, an elected district attorney " Article XI, section 4 establishes county charters that provide for an elected sheriff and an elected district attorney ... their election or appointment, compensation, terms and removal." Article IV, section 13 allows the Attorney General to have "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime

in their respective jurisdictions as the Attorney General may seem advisable."

Likewise, under California statutory law, the sheriff and district attorney have dual functions as both state and county officials. There are some provisions that suggest that the sheriff and district attorney are county officers. Cal. Gov. Code § 24000 states that both the sheriff and district attorney are county officers. In addition, counties set the salaries of the sheriff and district attorney under Cal. Gov. Code § 25300. Also, the sheriff and district attorney must be registered to vote in their respective counties pursuant to Cal. Gov. Code § 24001. Moreover, under Cal. Gov. Code § 3060, the sheriff and the district attorney can be removed from office following the accusation of the county grand jury. Finally, Cal. Gov. Code § 25303 allows the county to supervise the sheriff and district attorney's conduct and use of public funds. However, there are other provisions that indicate that the sheriff and district attorney are state officers. Cal. Gov. Code § 25303 provides that county supervision "shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney." In addition, Cal. Gov. Code §§ 12550 and 12560 provide the Attorney General direct supervision over the sheriffs and district attorneys and may require of them written reports concerning the investigation, detection and punishment of crimes in their respective jurisdictions. Moreover, under Cal. Gov. Code § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the Jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also, the Attorney General can call into conference the

sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal. Gov. Code § 12524.

With respect to case law, the Ninth Circuit has stated that the federal court must consider California state law to give due respect to decisions by the California Supreme Court as the ultimate interpreter of California state law. *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir 2000) Moreover the court stated that "[a]ll relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal investigations." *Id.*

In *Pitts v. County of Kern*, 17 Cal.4th 340, 362 (1998), the California Supreme Court after a *McMillian* analysis, concluded that the district attorney represented the state when preparing to prosecute and when prosecuting criminal violations of state law. Likewise, in *Weiner*, the Ninth Circuit found that the district attorney was a state officer when deciding whether to prosecute an individual. *Weiner*, 210 F.3d at 1031.

With respect to whether the sheriff acts as a county or state officer, the state and federal courts have reached differing conclusions. The court in County of *Los Angeles v. Superior Court (Peters)*, 68 Cal. App.4th 1166, 1178 (1998), concluded that in setting policies concerning the release of persons from the county jail, the sheriff acted as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the county. Moreover, two district courts have hell that the sheriff acts as a state official when providing security for the superior court. *Hawkins v.*

Comparet-Cassani, 33 F. Supp.2d 1244, 1253 (C.D. Cal. 1999); *Boakye-Yiadom v. County of San Francisco*, 1999 WL 638260, at * 3 (N.D. Cal. August 18, 1999). In addition, one district court found that the Sheriff is a state official when acting as a jailer. *Smith v. County of San Mateo*, 1999 WL 672318, at *7 (N.D. Cal. Aug. 20, 1999). However, another district court held the opposite, concluding that the sheriff acted on behalf of the county when he operated the county jail and made policy concerning the treatment of inmates and arrestees in need of medical attention. *Leon v. County of San Diego*, 2000 WIL 1476330, at *5 (S.D. Cal. Sept. 9, 2000). In addition, a district court has held that the sheriff is a county official when he encourages mistreatment of female crime victims or does not adequately prepare his staff to deal with female spousal abuse victims. *Roe v. County of Lake*, 107 F. Supp.2d 1146, 1152 (N.D. Cal 2000).

In the present case plaintiffs allege that the County is liable because the sheriff and the district attorney executed the search warrant in their investigative capacities as county officials, However, based on statutory law and case law, the court concludes that the sheriff and the district attorney acted as state officials when the district attorney requested the search warrant from the superior court and the sheriff executed the search warrant. First, under Article IV, section 13, the Attorney General has direct supervision over every district attorney and sheriff and may require them to make reports concerning the investigation, detection, prosecution, and punishment of crime in their, respective jurisdictions as the Attorney General may seem advisable. This language is reflected in Cal. Gov Code § 12550 and 12560. Second, under § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of

crime within the jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also the attorney General can call into conference the district attorneys and sheriffs for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal. Gov. Code § 12524. Third, when the sheriff and or his deputies execute the search warrant, they act at the bequest of the superior court, which issued the search warrant Unlike *Roe*, which dealt with the sheriff departments treatment of women victims, and *Leon*, which addressed the medical treatment of arrestees, the present case deals with the execution of a facially valid search warrant ordered by the superior judge, a state official. Here, the situation is more similar to *Hawkins* and *Boakye-Yiadom*, where the courts held that the sheriff acted as a state official when he provided security for the superior court. Finally, the district attorney and sheriff were conducting an investigation into the alleged violations of state felonies involving welfare fraud when they executed the search warrant. Notwithstanding the fact that the County is responsible for the investigation of applications for Aid to Families with Dependent Children (ADFC) under Cal. Wel. & Inst. Code § 18491 and the administration of AFDC programs pursuant to Cal. Wel. & Inst. Code § 18470, the court finds that the search warrant was obtained and executed in furtherance of state law to prevent welfare fraud.

2. District Attorney

Neither states nor state officials acting in their official capacities are "persons" within the meaning of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71

(1989). "[A] suit against a state official in his or her official is not a suit against the official but rather is a suit against the official's office." *Id.* Personal capacity suits seek to impose personal liability upon a government official for the actions that he takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "official capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* (citation omitted).

The court finds that the district attorney acted in his official capacity as a state official when the district attorney's office obtained a search warrant in connection with the welfare fraud investigation. Thus, the district attorney is not liable in his official capacity because he is not a person for purposes of section 1983 liability.

With respect to the personal capacity suit, defendant McDowell argues that he has absolute and qualified immunity.

The prosecutor is afforded absolute immunity from a civil suit for damages under § 1983 when initiating a prosecution and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) An absolute immunity defeats the suit at the outset provided that the official's actions were within the scope of the immunity. *Id.* at 419 n.13. The Supreme Court declined to consider whether absolute immunity applied to aspects of the prosecutor's responsibilities that cast him in the role of an administrator or investigative officer rather than that of advocate. *Id.* at 430-31. In particular, the Court left standing *Pierson v. Ray*, 386 U.S. 547, 557 (1967) which held that a prosecutor engaged in certain investigative activities enjoys, not the absolute

immunity associated with the judicial process, but only a good-faith defense comparable to a police officer's defense. *Id.* at 430.

In the present case, the district attorney's office filed for the search warrant during an investigation into welfare fraud. Thus, the district attorney is not afforded absolute immunity but has qualified immunity.

Government officers performing discretionary functions may exert a qualified immunity in so far as their conduct does not violate clearly established statutory or constitutional rights that would have been known to a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Horlow*, 457 U.S. at 818. The judge may appropriately consider whether the law was clearly established at the time the action occurred. *Id.*

Here, plaintiffs allege that District Attorney McDowell was put on inquiry notice that his acts where illegal based on the California's policy with respect to tribal sovereignty. Plaintiffs point to the preamble to the Compact as evidence of the stare's policy of fostering tribal-state cooperation. In addition, plaintiffs argue that Cal. Fish & Game Code § 1600-1610 authorizes the Department of Fish & Ga/ne to execute agreements on behalf of the State and other Native American

tribes; thus, there is tribal-state cooperation with respect to jurisdictional disputes. Finally, the California Legislature recently passed Assembly Concurrent Resolution No. 185, which:

> reaffirms state recognition of the sovereign status of federally recognized Indian tribes as separate and independent political communities within the United States, and encouraging all state agencies, when engaging in activities or developing policies affecting Native American tribal rights or trust resources, to do so in a knowledgeable, sensitive manner that is respectful of tribal sovereignty, and encourage all state agencies to continue to reevaluat, and improve the implementation of laws affecting the Native American tribal rights.

In addition, plaintiffs argue that the search warrant was invalid because it failed to inform the superior court that there was no jurisdiction to execute the search warrant and the seized records of seventy-eight other tribal employees went beyond the scope of the search warrant.

A fraud investigation that required the search and seizure of payroll records does not violate California policy even in light of the State's recent expression of respect and recognition for tribal sovereignty. California's policy does not conflict with Public Law 280, which allows the state and thus the district attorney to impose California criminal law on tribal lands. Moreover, the district attorney's alleged failure in informing the court of possible jurisdictional problems is not troubling because the magistrate should have considered

this when he issued the search warrant. Thus, the court concludes that the district attorney has qualified immunity because his conduct did not violate any clearly established statutory or constitutional rights.

3. Sheriff

The sheriff was acting as a state officer when his department executed the warrant. As such, he is not liable under section 1983 in his official capacity. With respect to the individual capacity suit, the sheriff has qualified immunity because his department merely executed a facially valid search warrant signed by the magistrate. Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's Scope because each page contained at least one reference to the employees that were under investigation.

D. Public Law 280 and Sovereign Immunity

Plaintiffs contend that their sovereign immunity precluded the issuance of the search warrant. They contend that Public Law 280 does not provide the defendants with authority to search and seize the payroll records even where there is probable cause under the Fourth Amendment. Defendants assert that they are entitled to obtain and execute the search warrant pursuant to Public Law 280.

Public Law 280 grants certain states criminal jurisdiction over Indians who commit or are victims of crimes on reservations. Section 18 U.S.C. § 1162 provides in pertinent part:

> Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State. . .and the criminal laws Of such State . . .shall have the same force and effect within such Indian country as they have elsewhere within the State. . . :
> California. . . all Indian country within the State.

The Supreme Court explained that "the primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County,* 426 U.S. 373, 379 (1976). In determining whether a state has Public Law 280 jurisdiction, the court must look to the intent of the state law. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209(1987). If the intent of the state law is generally to prohibit certain conduct, the conduct falls within Public law 280's grant of criminal jurisdiction as criminal/prohibitory; but, if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation. *Id.*

Here, California has criminal jurisdiction over Native Americans oh tribal lands under Public Law 280 because the laws that the district attorney and sheriff sought to enforce are criminal/prohibitory laws rather than regulations. The more

difficult question is whether the state has jurisdiction over the tribe itself.

In *Bryan v. Itasca County*, the Supreme Court indicated that Public Law 280 did not explicitly confer state jurisdiction over tribes. The court stated,

> [N]othing in [Public Law 280]'s legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes, into little more than "private, voluntary organizations" - a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for the "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe . . .if not inconsistent with any applicable civil law of the State" contemplates the continuing vitality of tribal government.

Bryan v. Itasca County, 426 U.S. at 388 (citations omitted). However, the discussion of Public Law 280 was in connection with the Court's review of 28 U.S.C. § 1360, which grants limited civil jurisdiction to the states. Moreover, the Supreme

Court has refused to apply a per se rule that would exclude state jurisdiction over tribes and tribal members in the absence of express congressional consent. *Cabazon Bond of Mission Indians*, 480 U.S. at 214-15.

In *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), the Native American defendant was accused of raping another Native American. He requested documents relating to the victim's alleged alcohol and drug problems that were in the possession of a tribe's Department of Social and Health Services. *Id.* The district court quashed the subpoena to the Quinault Indian Nation based upon sovereign immunity. On appeal, the Ninth Circuit affirmed. The court stated,

> By making individual Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is waived. . . The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim.

Id. at 1319. The court concluded that the Quinault Tribe possessed tribal immunity at the time the subpoena was served. *Id.* Moreover, !the court found that the Quinault Indian Nation did not explicitly waive its sovereign immunity in the Social and Health Services documents when it voluntarily gave different documents relating to the victim that were located in the Housing Authority files. *Id.* at 120.

The plaintiffs seek to analogize *United States v. James* to the present case. Plaintiffs argue that if the Ninth Circuit

finds no authority for the federal court to obtain tribal records by issuance of a subpoena, then the State and its political subdivisions should have no greater authority to seize payroll documents pursuant to a search warrant. However, the present case is distinguishable from *James*. In *James*, the tribe was a third party and was not directly involved in the criminal prosecution. The tribe asserted sovereign immunity to protect the Native American victim and to foster confidence in the tribe's Social and Health Services. In the present case, plaintiffs' claim of sovereign immunity advances the tribe's right to self-governance, but does so, at the expense of the state's interest in preventing welfare fraud. In the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant against the tribe and tribal property. Thus, the court finds that the tribe's sovereign immunity does not prohibit the execution of the search warrant against the tribe and its property.

E. Indian Gaming Regulatory Act

The plaintiffs argue that the IGRA eviscerated any jurisdiction that Defendants asserted prior to the passage of IGRA. In addition, the plaintiffs argue that there was no compact in place at the time of the unlawful search of the Tribe's gaming facility.

The IGRA provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country" in the absence of a compact providing for state jurisdiction. 18 U.S.C. § 1166(d). "If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision20 has been impliedly

repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994). As the Eight Circuit explained, "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it to completely preempt state law." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996).

Here, the investigation and the execution of the search warrant involves welfare fraud, not gaming regulation by the state. The fact that the search warrant was executed at a gaming facility is unimportant. Because the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption. Although both parties mention the Compact in their analysis of whether there is IGRA preemption of Public Law 280, the court does not address the Compact because it concludes that IGRA does not preempt Public Law 280.

F. Constitutionality of Public Law 280

Plaintiffs contend that the California Legislature must affirmatively adopt Public Law 280 before the executive branch may impose criminal jurisdiction. Plaintiffs argue that the executive branch may not assume the fundamental act of establishing policy or be delegated the act of establishing policy by the legislature. As plaintiffs acknowledge, the one case addressing this issue under California law directly contradicts plaintiffs' argument.

In *People v. Miranda*, 106 Cal. App.3d 504, 505 (1980), the Native American defendant was charged with arson committed on Indian land. The trial court held that the

California courts did not have jurisdiction. *Id.* The appeals court reversed. *Id.* The court stated that "it was not required that California enact some form of enabling legislation to assume jurisdiction before the terms of 18 U.S.C. 1162 became effective in this state." The Tenth Circuit, analyzing Colorado law agreed, stating:

> A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the state, with jurisdiction unless such state law itself prevents the state from exercising such jurisdiction. Upon cessation of such jurisdiction to a state, federal law no longer preempts the state's exercise of its inherent police power over all persons within its borders, and the state is automatically vested with jurisdiction in the absence of state law to the contrary.

The plaintiffs distinguish *Burch* from the present case by arguing that *Burch* involved Colorado law, not California law. According to plaintiffs, Colorado is different from California because it was a voluntary state that became a mandatory state in 1984 while California was one of the five mandatory states when Public Law 280 was enacted. Because Colorado only later became a mandatory state, the *Burch* court only addressed preemption. Plaintiffs argue that the analysis for California law is different from Burch because California's Tenth Amendment was and continues to be violated by Public Law 280. Plaintiffs' attempt to distinguish the holding of *Miranda* from the present case is unpersuasive because there is no Tenth Amendment violation as the court will address shortly. Since there are no cases to the contrary

after fifty years, the court concludes that Public Law 280 is enforceable by the executive branch without need of an enabling act.

Finally, plaintiffs argue that Public Law 280 violates the Tenth Amendment. They contend, that Public Law 280 improperly imposes upon California, the burden of implementing the federal government's scheme to meet the federal government's obligation to ensure law and order on Indian lands.

The court agrees with the defendants that there is no implementation of a federal government scheme here. There is no attempt by congress to mandate that the state assist in the enforcement of a federal statutory scheme such as in *Printz v. United States*, 521 U.S. 898 (1997) or to require the state legislature enact one of three laws proposed by the federal government as in *New York v. United States*, 505 U.S. 144, 162 (1992). Rather, Public Law 280 allows California to impose its own state criminal law. Here, Congress is simply allowing California to exert its police power over the Indian lands within its boundaries. Thus, the court finds that Congress did not violate the, Tenth Amendment in passing Public Law 280.

ACCORDINGLY, IT IS SO ORDERED that Defendants' Motion to Dismiss be granted.

Dated: November 22, 2000.

/s/ _____
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983.

This statute concerns civil actions for deprivation of rights. Its full text provides:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." Its full text provides:

"§ 1152. Laws governing

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

3. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." Its full text provides:

"§ 1153. Offenses committed within Indian country

"(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the

Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

4. 18 U.S.C. § 1162.

This statute concerns the applicability of State criminal law in the six identified States to crimes committed by or against Indians in the Indian Country of those States. It is commonly known as "Public Law 280." Its text provides in pertinent part:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
"Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
"California	All Indian country within the State
"Minnesota	All Indian country within the State, except the Red Lake Reservation
"Nebraska	All Indian country within the State
"Oregon	All Indian country within the State, except the Warm Springs Reservation
"Wisconsin	All Indian country within the State

"(b) . . . .

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."

Supreme Court, U.S.
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No. 02-281

IN THE

Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, Individually and as District Attorney; DAN LUCAS, Individually and as Sheriff,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; and BISHOP PAIUTE GAMING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BISHOP PAIUTE TRIBE AND BISHOP PAIUTE GAMING CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether county officers may execute a search warrant issued by a state court against an Indian tribe and tribally-owned gaming enterprise located on reservation trust lands to seize personnel records related to employees who are tribal members in violation of the Tribe's sovereign immunity and in derogation of the Tribe's policies governing the privacy of employee personnel records?

2. May the Tribe or a tribal corporation bring suit under 42 U.S.C. § 1983 for violation of its rights secured by the Fourth Amendment to the United States Constitution?

3. Whether the county officers who executed the search warrant are entitled to qualified immunity under 42 U.S.C. § 1983?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, this case involves the following:

1. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

This statute provides for the regulation of gambling activities on Indian lands. Relevant excerpts are set forth in Appendix A ("App."), *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

1. Introduction

Respondent Bishop Paiute Tribe [1] (Tribe) is a federally recognized tribe of Indians that beneficially owns all the trust lands of the Bishop Paiute Reservation located in Eastern California and exercises governmental jurisdiction over its Reservation. Most residents of the 875-acre Reservation are tribal members. The Tribal Council, elected by the Tribe's voters, governs the Reservation pursuant to tribal codes, resolutions, policies and procedures, tribal custom and applicable federal law. The Tribe owns the Bishop Paiute Gaming Corporation (Corporation), the other Respondent, which is a corporation chartered under the laws of the Tribe. The Corporation operates a casino, known as the Paiutē Palace Casino, on the Reservation.

---

[1] While the Bishop Paiute Tribe refers to itself as "the Bishop Paiute Tribe"—as did the District Court and the Court of Appeals in the proceedings below—Petitioners identify the Tribe by another name in the Petition. Unless stated otherwise in the text, the term "Tribe" shall refer both to the Bishop Paiute Tribe and the Bishop Paiute Gaming Corporation.

2. Operation of tribal casino pursuant to IGRA

The Tribe's casino employs approximately 140 persons, of whom approximately 80 percent are Native American, mostly tribal members. It is the principal source of employment and revenue for the Tribe and its members.

Casino gaming by Indian tribes is regulated as provided in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, enacted by Congress in 1988 after this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). IGRA allows tribes to conduct casino-style games—defined as class III games in the Act, 25 U.S.C. § 2703(8)—on Indian lands *only* if the tribe negotiates a compact with the state setting forth the terms and conditions for the operation of the games. 25 U.S.C. § 2710(d)(1)(C), (3) (App. 3a-4a).

Pursuant to IGRA, the Tribe and the State of California negotiated and, on December 9, 1999, executed a Tribal-State Gaming Compact (Compact) authorizing and establishing provisions for regulation of casino-style games on the Bishop Paiute Reservation. (ER [2] 189). The Compact became effective May 16, 2000 when it was approved by the Secretary of the Interior, as IGRA requires. 25 U.S.C. § 2710(d)(1)(C), (3) (App. 3a-4a); 65 Fed. Reg. 31,189 (May 16, 2000) (ER 345).

The Compact requires the casino to provide the State Gaming Agency access to all "papers, books, and records" of the casino for inspection and copying, and provides that the State Gaming Agency (the California agency or agencies delegated duties under the Compact) may retain such records and copies "as reasonably necessary for completion of any investigation of the Tribe's compliance with this Compact." Compact § 7.4.3(a) (ER 166). The Compact provides that these records and copies remain the property of the Tribe, and

[2] "ER" refers to excerpts of record filed with the Court of Appeals.

requires that the State Gaming Agency preserve their confidentiality. *Id.* at § 7.4.3(b) (ER 166-167). While the Compact provides that the State and Tribe shall establish protocols for sharing with law enforcement officers information learned in background investigations, *id.* § 7.4.3(b)(ii) (ER 167), there is no provision requiring the release of casino personnel records to county law enforcement officials engaged in enforcing state welfare laws.

Many years prior to opening the casino, the Tribe established and implemented policies limiting access to records of all tribal employees in order to encourage disclosure of relevant information to the Tribe by its employees and to protect their privacy interests. As the Court of Appeals found, these policies are based on and similar to federal and state laws governing public records and personnel information related to government employees. Pet. at 20a, 23a.

3. County officials' seizure of tribal personnel records

In February, 2000, the Tribe received a request for payroll records related to three casino employees, all tribal members, from the Inyo County District Attorney's Office, related to the County's investigation into possible welfare fraud. The Tribe responded that its long-standing policy prohibits disclosing personnel information without the written consent of the employee to whom the records relate, and therefore it could not provide the requested records.[3]

On March 23, 2000 the California Superior Court for the County of Inyo issued a search warrant authorizing the sheriff

[3] Without citing to the record, Petitioners allege that the Tribe has provided similar information in the past pursuant to informal requests and a warrant, Pet. at 4-5, which would have been contrary to established tribal policy. Respondents dispute this allegation.

to search the Tribe's casino and obtain the payroll records for these three employees. The warrant was based on an affidavit submitted by an investigator for the district attorney's office alleging that the employees had received welfare assistance from the Inyo County Department of Health and Human Services in excess of their eligibility because of a failure to fully disclose their earnings.

The district attorney's office and the sheriff executed the search warrant by entering the casino premises and, using deadbolt cutters, removed the locks used to secure the confidential records. Over the objections of the casino staff, they seized the time card entries, payroll registers, payroll check registers and quarterly payroll tax information [4] for these three employees, as well as seventy-eight other casino employees. The district attorney and sheriff did not provide casino staff with the opportunity to redact the names and information regarding the employees whose records were not within the terms of the search warrant.

In July 2000, the district attorney requested personnel records for six additional casino employees who were also tribal members. In an effort to accommodate the district attorney's request and still adhere to its policies, the Tribe stated that it could accept the consent provided by an employee on the welfare application by way of a redacted copy of the last page of the welfare application submitted by the employee. The district attorney refused to provide these documents.

B. Proceedings below

Faced with the threat of another search warrant, the Tribe brought this action in District Court for declaratory and

[4] The Tribe had already provided the State with much of the information in the seized records by completing and submitting forms prepared by the California Franchise Tax Board regarding wage withholdings. *See* Pet. at 3.

injunctive relief against the County and county officials asserting that they exceeded their authority under federal law. The Tribe also sought damages pursuant to 42 U.S.C. § 1983 on the ground that the County and its officials violated its rights under the Fourth Amendment of the United States Constitution. The Tribe also challenged the validity of Public Law 280, 18 U.S.C. § 1162(a) (hereinafter "Public Law 280").

The District Court dismissed the suit, and the Tribe appealed. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The Court of Appeals affirmed rejection of the challenge to Public Law 280. It granted the Tribe declaratory and injunctive relief, holding that the County and county officials violated the Tribe's sovereign immunity and its right under federal law to make its own laws and be ruled by them free from state interference.

Noting that "[a]bsent a waiver of sovereign immunity, tribes are immune from processes of the court," Pet. at 18a, the Ninth Circuit determined that Public Law 280 did not authorize the warrant, because that Act "was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations" and did not waive tribal sovereign immunity or grant states jurisdiction over tribes. Pet. at 17a, 19a (citing *Bryan* v. *Itasca County*, 426 U.S. 373, 389 (1976)). The Court of Appeals rejected the County's argument that this Court's decisions construing the scope of tribal authority over non-Indians controlled the question presented here—the extent of state authority over the Tribe itself and its property. *Id.* at 19a.

The Court of Appeals also held that the search warrant violated "the more fundamental right of the Tribe not to have its policies undermined by the states and their subdivisions." *Id.* at 20a (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). The Ninth Circuit found that

"[t]he Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines." *Id.* at 20a. The Ninth Circuit explained that "[t]he enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income." *Id.* at 23a. Accordingly, the Court of Appeals held that the execution of the search warrant interfered with "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 20a (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The Court of Appeals also determined that the county officials had less intrusive means available to them to enforce state welfare laws:

> The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer.

Pet. at 25a-26a.

The Court of Appeals held that the county officials acted on behalf of the County for purposes of Section 1983 liability. Pet. at 35a-38a (relying on *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)).

Finally, the Court of Appeals held that the county officials were not entitled to qualified immunity. Pet. at 38a. Applying this Court's standards for qualified immunity, *see Saucier v. Katz*, 533 U.S. 194 (2001), the court first held that the Petitioners' obtaining and execution of the search warrant violated the Fourth Amendment because it exceeded the County's jurisdiction. The court below then determined that that the law was sufficiently clear that a reasonable officer would have known that he had no jurisdiction to search and seize a Tribe's personnel records as part of a criminal investigation of an individual Indian. Pet. at 6a-7a.

The County's request for a rehearing *en banc* was denied. Pet. at 8a. During the pendency of the appeals, the district attorney voluntarily dismissed the criminal proceedings against the three casino employees "due to lack of probable cause." Resp. to Pet. Reh. En Banc at 5 n.1.

SUMMARY OF ARGUMENT

1. The decision below holds that the County and its officials violated the Tribe's sovereign immunity and right to self-government when they obtained and executed a search warrant issued by a state court seizing personnel records of the Tribe's casino enterprise. The opinion is a thoughtful, well-reasoned and routine application of this Court's precedents clearly establishing that, absent their consent or Congressional authorization, Indian tribes are immune from state court process and are protected from state interference with their right to govern themselves. *E.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751, 756 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-11 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986); *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

This Court has held that federal law does not authorize states to regulate Tribes' gaming enterprises. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212-14 (1987). Following *Cabazon*, Congress enacted the IGRA, 25 U.S.C. §§ 2701-2721, comprehensively regulating Indian gaming and requiring tribes that operate casinos to enter into compacts with states concerning the terms and conditions of casino operation. California's Compact with the Tribe accords the State considerable authority over casino operations, including access to certain records, but does *not* require the Tribe to provide employee personnel records to state or county officials investigating possible violations of state welfare laws.

Finally, the decision below is consistent with this Court's precedents in *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Montana v. United States*, 450 U.S. 544 (1981). Those cases limit the governmental authority of tribes and tribal courts over nonmembers of the tribe, including state officials. *Hicks*, for example, sustained a search of an individual Indian's home pursuant to a state court warrant, not assertion of a state's authority over a tribe. This case, moreover, does not involve any assertion of tribal governmental authority over any state official or other nonmember. Instead, it concerns protecting from state interference a tribe's ability to control its members and economic enterprise on its reservation, which are internal affairs of the Tribe.

2. The decision below is also consistent with this Court's precedents under 42 U.S.C. § 1983. There is no basis for the Court to consider Petitioners' challenge, raised for the first time here, to review the Court of Appeals' finding that the Tribe is a "person" entitled to bring an action under Section 1983. There is no Circuit split. Finally, the search and seizure carried out in excess of Petitioners' jurisdiction and in violation of the Tribe's rights to immunity and self-government were unreasonable under the Fourth Amendment and actionable under Section 1983.

The court below determined that Petitioners are not entitled to qualified immunity, applying the two-part test established by this Court in *Saucier v. Katz*, 533 U.S. 194, 207-08 (2001). After finding that Petitioners had violated the Fourth Amendment, the Court of Appeals determined that the law was clearly established such that a reasonable officer in these circumstances would understand that his or her conduct violates the law. In applying this standard, the Ninth Circuit relied principally on its decision in *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992), and the decision in *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1508 (S.D. Cal. 1992), *aff'd*, 54 F.3d 535, 543-44 (9th Cir. 1995). There is no reason for this Court to review the Ninth Circuit's application of this Court's standards, which in any event was correct.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWS WELL-ESTABLISHED FEDERAL INDIAN LAW PRECEDENTS OF THIS COURT

The writ should be denied because the decision below does not involve any important question of federal law which has not been settled by this Court. Rather, the court below correctly applied firmly established and long-standing Indian law precedents of this Court.

A. This Court has consistently reaffirmed tribal sovereign immunity from compulsory state court process

This Court has consistently held that tribes, like other sovereigns, enjoy immunity from suit absent their consent or authorization by Congress. *E.g.*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("Indian Nations are exempt from suit without Congressional authorization."); *Santa Clara Pueblo v. Martinez*, 436 U.S.

49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.") (citations omitted). The Court has found that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). In 1998 the Court reiterated that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The Court applied the doctrine again recently in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, . . . Congress has consistently reiterated its approval of the immunity doctrine. See, e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

In *Kiowa* the Court noted that the tribal immunity doctrine is "settled law" and once again declined an invitation to revise

it, citing Congress' past reliance on it and power to alter it. 523 U.S. at 756, 758-59.[5]

On repeated occasions, the Court has specifically held that the immunity doctrine protects tribes against compulsory orders of state courts. *See Kiowa, supra*; *Three Affiliated Tribes, supra; Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *see also Citizen Band of Potawatomi, supra*. In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756. The Court specifically held that tribal immunity is not limited to governmental activities or even to activities on the reservation. *Id.* at 755.

In *Three Affiliated Tribes*, the Court made clear that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." 476 U.S. at 891. The Court struck down a state statute conditioning the availability of state courts to tribes and Indians for civil claims on the waiver by the Tribe of sovereign immunity for all civil suits, holding the statute "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Id.* at 891.

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[5] While it is true that the Court in *Kiowa* expressed concerns about the tribal sovereign immunity doctrine, *see* Pet. at 11-13, the Court unequivocally declined to modify this doctrine and instead concluded that the matter was best resolved by Congress. 523 U.S. at 758-60. At the time of the *Kiowa* decision, Congress was considering proposed legislation limiting the scope of tribal sovereign immunity, and it has considered similar proposals since. *See* S. 613, 106th Cong. (1999); S. 615, 106th Cong. (1999); S. 1691, 105th Cong. (1998); S. 2097, 105th Cong. (1998). Congress has never enacted this proposed legislation.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members authorized to exercise treaty fishing rights and the number of fish caught by such fisherman because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction. The Court expressly distinguished between the power of the state court [6] to issue orders against individual tribal members and against the Tribe, holding that the state court had jurisdiction over the former but not the latter. *Id.* at 171-72.

This Court has also held that Congress did not confer jurisdiction on states over tribes or abrogate tribes' immunity from suit in state courts when it enacted Public Law 280. In Public Law 280, Congress extended the jurisdiction of certain states, including California, over criminal offenses by individual Indians on Indian reservations, and over civil actions involving Indians arising on reservations. But this Court has held that in Public Law 280 "there is notably absent any conferral of state jurisdiction *over the tribes themselves*." *Bryan v. Itasca County*, 426 U.S. at 389 (emphasis supplied). In *Three Affiliated Tribes*, the Court repeated: "[w]e have never read Pub.L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub.L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance." 476 U.S. at 892.

[6] Washington, like California, is a Public Law 280 state. *Id.* at 175 n.14.

The Court again explained in *Kiowa* that statutes permitting state regulation of tribal or Indian activities do not affect the immunity of the Tribe itself, explaining:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S. at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them. *See id.* at 514.

523 U.S. at 755; *see also Citizen Band Potawatomi*, 498 U.S. at 513 ("We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations.").

This Court's precedents[7] discussed above clearly establish that the Tribe and its tribal enterprise are immune from

[7] California courts, including the California Supreme Court and the court of appeals for the district including Inyo County, have also repeatedly recognized and applied the tribal immunity doctrine, *see Boisclair v. Superior Court*, 801 P.2d 305, 276 Cal.Rptr. 62, 72-73 (Cal. 1990); *Trudgeon v. Fantasy Springs Casino*, 84 Cal.Rptr.2d 65, 69 (Cal.Ct.App. 1999); *Long v. Chemehuevi Indian Reservation*, 171 Cal.Rptr. 733, 734-35 (Cal.Ct.App. 1981), and have specifically held that state courts lack jurisdiction over tribes themselves. *Trudgeon*, 85 Cal.Rptr.2d at 71; *Chemehuevi*,171 Cal Rptr. at 735.

compulsory process of state court, and compel the decision below that the state court's search warrant was in excess of its jurisdiction.[8]

B. The decision below is consistent with this Court's decisions holding that states may not interfere with tribes' rights to self-government

Petitioners' claim that the Ninth Circuit decision conflicts with *United States v. Wheeler*, 435 U.S. 313 (1978), Pet. at 16, is mistaken. Like *Wheeler*, this case involves a tribe's power over its internal affairs, specifically protection from state intrusions into a tribe's operation of a vital tribal enterprise essential to its economic advancement, and its promulgation of personnel rules governing employment of its own members in that enterprise.

In *Wheeler*, this Court held that the United States could prosecute an Indian under the Indian Major Crimes Act, 18 U.S.C. § 1153, where the defendant had previously been convicted of an offense arising out of the same incident in a tribal court. The Court held the federal prosecution did not constitute double jeopardy, because the "tribal and federal prosecutions are brought by separate sovereigns." 435 U.S. at 329-30. This was so, the Court reasoned, because Indian tribes have inherent powers to function as self-governing communities that are not derived from a delegation of authority from the United States. *Id.* at 322-27. The Court in *Wheeler* confirmed that tribes retain the power "of regulating their internal and social relations," *id.* at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)), and that "[t]heir right of self-government includes the right to prescribe laws applicable to tribe members." 435 U.S. at 322. By contrast, as this Court observed in *Wheeler*, "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326.

In this case, as in *Wheeler*, the Tribe is simply exercising its right to self-government to adopt its own laws and apply them to its members, as well as to a tribally owned enterprise on its Reservation. Like the United States, *see* 5 U.S.C. §§ 552, 552a, and many states, *see Detroit Edison Company v. National Labor Relations Board*, 440 U.S. 301, 318 n.16 (1979),[9] including California, Cal. Gov't Code §§ 6250, 6254(c), the Tribe's policies prohibit release to third parties of personnel records or information without the written consent of the employee to whom the records relate. Such policies are necessary for encouraging full and accurate disclosure of relevant information by tribal employees in matters related to their employment as well as for protecting employees' privacy interests.

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[8] The decision below is consistent with cases holding that state courts may not require federal employees to comply with state subpoenas except as permitted by federal regulation or other waiver of immunity. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Edwards v. U.S. Department of Justice*, 43 F.3d 312 (7th Cir. 1994); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989).

[9] In *Detroit Edison* the Court found:

> A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies. *See e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed unless the request falls within explicit statutory exception) . . . See also U.S. Privacy Protection Study Comm'n, Personal Privacy in an Information Society (1977) (recommending that all employers should be under a duty to safeguard the confidentiality of employee records).

440 U.S. at 318, n. 16 (citations omitted).

Tribes' right to govern internal tribal affairs such as these is firmly rooted in this Court's precedents. As the Supreme Court held in the historic Cherokee cases, an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and retains the "right of self-government," free from state interference. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832). While the Court has modified the principles in the Cherokee cases in matters involving tribal authority over non-Indians, *e.g.*, *Wheeler*, 435 U.S. at 326, it has consistently recognized that with respect to its members on its reservation, tribes have "the right . . . to make their own laws and be ruled by them," and that state action may not infringe upon that right. *Williams v. Lee*, 358 U.S. 218, 220 (1959); *see also Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470, 502 (1979); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-43 (1980); *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-73 (1973).

C. The decision below is also consistent with this Court's decisions and the actions of Congress in the Indian gaming area

In the specific area of tribal gaming enterprises, this Court has rejected California's attempt under Public Law 280 to enforce state regulatory law against a tribally-operated bingo parlor on reservation lands. *Cabazon*, 480 U.S. at 221-22. In *Cabazon*, the Court rejected an argument strikingly similar to one the Petitioners make here, Pet. at 9-10, 15, that application of state laws to tribal casinos is essential to avoid lawless enclaves within a state, holding:

> We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club.

480 U.S. at 221-22.

The Court in *Cabazon* emphasized the importance of tribally-run gaming operations for tribes' achieving federal goals of economic self-sufficiency. After discussing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id.* at 216, the Court in *Cabazon* concluded that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 219.

Here, as in *Cabazon*, the Bishop Paiute Reservation "contain[s] no natural resources which can be exploited." *Id.* at 218. The casino games provide the principal "source of revenues for the operation of the tribal government[ ] . . . and the provision of tribal services. They are also the major source[ ] of employment" on the Reservation. *Id.* at 218-19. The State of California itself has agreed that "Indian gaming has become the single largest revenue-producing activity for Indian tribes" and that it promotes "tribal economic development, and generate[s] jobs and revenues to support the Tribe's government and governmental services and programs." Compact, Preamble § D, § 1(b) (ER 146-47).

Furthermore, Petitioners' claim that the decision below will interfere with law enforcement fails because tribal gaming is also subject to substantial regulation pursuant to federal law.[10] Immediately after *Cabazon*, Congress enacted the

[10] Petitioners' claim that the decision below may affect the ability of federal law enforcement to obtain evidence from tribal property, Pet. at 10, is entirely speculative and unsupported.

IGRA, a comprehensive regulatory scheme governing tribal casinos. Congress in the IGRA required tribes conducting class III gaming (*i.e.*, casino games)—including the Bishop Paiute Tribe—to conclude compacts with states on the terms and conditions governing such gaming.

The Tribe's Compact with California contains a broad range of provisions governing the Tribe's casino. These include the licensing of casino employees.[11] Under the Compact, the Tribal Gaming Commission has the primary responsibility for conducting background investigations and making suitability determinations, subject to oversight by a federal agency established by IGRA—the National Indian Gaming Commission—*and a separate licensing procedure by the State of California*. 25 U.S.C. § 2710(c)(1), (2); 25 C.F.R. § 558.4; Compact § 6.5.6 (ER 163-65). Employees must disclose all relevant information to the Tribal Gaming Commission, 25 C.F.R. § 556.4 (App. 6a-9a), which is responsible for the day-to-day oversight and enforcement of applicable gaming laws on the Reservation. Compact. § 7.1 (ER 165). The State Gaming Agency receives such information and has acknowledged and agreed that this information is confidential and may only be released with the consent of the employee. Compact § 6.4.8 (ER 161) (requiring releases from employees permitting furnishing of background information to State Gaming Agency); § 7.4.3(b) (ER 167) (requiring the State Gaming Agency to "exercise utmost care in the preservation of the confidentiality of any and all information and

[11] IGRA and its implementing regulations and the Compact also require nearly all employees of the casino to obtain and maintain current a gaming license as a condition of employment in the casino. 25 U.S.C. § 2710(b)(2)(F), (c), (d)(1)(A)(ii); 25 C.F.R. parts 556 and 558; Compact § 6.4.4 (ER 157-58). As a part of the licensing process, casino employees are also subject to a rigorous background investigation into their criminal (if any), financial, employment and residential history, as well as personal and professional references, in order to permit a determination regarding their suitability for employment in the casino. *Id.*

documents received from the Tribe and . . . apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure"); § 7.4.3(c) (records received from Tribe in compliance with the Compact are exempt from disclosure under California Public Records Act).

The Compact also establishes standards for public and workplace health and safety, including standards for food and beverage handling and water quality, and allows state inspections to enforce these standards. Compact §§ 7.4, 10.2(a), (b), (e) (ER 166, 174-75). The Compact also prescribes standards and procedures concerning tort liability, employment discrimination, check cashing, workers' compensation insurance, unemployment insurance, withholding state income taxes for certain employees, and labor relations. For example, with respect to unemployment compensation benefits, it provides:

> The Tribe agrees that its Gaming Operation will participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming Facility, including compliance with the provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the state agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement.

Compact § 10.3(b) (ER 176).

The Tribe's casino is subject to regulation by the Federal government as well. The National Indian Gaming Commission has the authority to promulgate regulations enforcing the Act on Indian lands, 25 U.S.C. § 2706 (b)(10) (App. 1a), review and approve tribal gaming laws and certain contracts, *id.* § 2712, inspect Indian gaming facilities for compliance,

id. at §§ 2706 (b)(1), (2) (App. 1a), and issue fines and order closure of gaming facilities for violations. *Id.* § 2713 (App. 4a-5a). The National Indian Gaming Commission is required to provide relevant information to other law enforcement officials. *Id.* § 2716(b) (App. 6a).[12]

Significantly for present purposes, the Compact between the Tribe and State does *not* require the Tribe to provide employee personnel records to State or County officials investigating violations of state welfare law. Petitioners, moreover, have ample remedies to obtain these records other than by a search warrant directed to the Tribe. *See Citizen Band Potawatomi,* 498 U.S. at 514 ("sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). As the Court of Appeals determined, the Petitioners could have obtained a search warrant on the property of the individual tribal employees under investigation or could have

[12] The assertions that the decision below will hinder law enforcement are greatly overstated for reasons beyond the federal interest in and regulation of gaming. First, the claim that the decision below may prevent law enforcement from seizing stolen property and arresting suspects in a tribal casino or obtaining witness testimony from casino employees goes well beyond the Ninth Circuit holding, which involved tribally-owned records seized in contravention of established tribal policy. It did not involve criminal suspects in a casino or employee witnesses. Furthermore, these arguments incorrectly presuppose that tribal governments have not established laws or policies aimed at investigating and prosecuting criminal violations. As stated in the Compact, "[t]he Tribe and the State share a joint sovereign interest in ensuring that tribal gaming activities are free from criminal and other undesirable elements." Compact, Preamble § F (ER 146). Many tribes have established police forces, *see Hicks,* 533 U.S. at 356 (describing cooperation between tribal police and state game warden); *Strate v. A-1 Contractors,* 520 U.S. 438, 456 n. 11 (1997) (describing tribal police activities); *Wheeler,* 435 U.S. at 314 (same), including in California, *see Moore v. Nelson,* 270 F.3d 789, 790 (9th Cir. 2001), and have entered into cooperative agreements with local and state law enforcement. *See infra* note 14.

provided the Tribe with the consent of the employees for the release of the records found in the welfare application that the Tribe indicated that it was willing to accept. Pet. at 25a. The State might also seek to amend the Compact to add provisions governing the sharing of this kind of information in the possession of a tribal casino.[13] Alternatively, the County could seek to negotiate a cooperative intergovernmental agreement with the Tribe concerning the exchange of records and sharing of resources needed for effective law enforcement concerning welfare fraud.[14]

D. The decision below is consistent with *Nevada v. Hicks* and *Montana v. United States*

Petitioners also argue, Pet. at 16, that the decision below conflicts "in principle, if not directly" with *Nevada v. Hicks,* 533 U.S. 353 (2001), and *Montana v. United States,* 450 U.S. 544 (1981). However, *Montana* and *Hicks* limit the regulatory and adjudicatory authority of tribes and tribal courts over non-Indians. By contrast, this case does not involve tribal governmental authority of any kind over non-Indians. It concerns a tribe's control over its members and economic enterprise, which are internal tribal affairs.

[13] The Compact has a term of twenty years, but may be amended at any time by agreement of the parties. Compact §§ 11.2.1, 12.1 (ER 179). Certain provisions are specifically subject to renegotiation prior to the expiration of the term. *Id.* §§ 10.8.3(b), 4.3.3, 12.2 (E.R. 176, 152-153, 179).

[14] "Some States have formally sanctioned the creation of tribal-state agreements," and "there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Hicks,* 533 U.S. at 393 (O'Connor, J., concurring) (citations omitted); *see also People v. Superior Court (Jans),* 274 Cal.Rptr. 586, 587 (Cal. Ct. App. 1990) (holding that Indian tribe comes within Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Cal. Pen. Code §§ 1334-1334.6).

1. *Nevada v. Hicks*

Nevada v. Hicks allowed the search of an individual tribal member's home pursuant to a state court search warrant. It did not involve any assertion of state authority over a tribe itself, nor any question of tribal immunity from state court process. 533 U.S. at 363.

More specifically, *Hicks* concerned "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355. In *Hicks*, an individual tribal member residing on an Indian reservation brought trespass, tort and civil rights claims (including claims under 42 U.S.C. § 1983) *in tribal court* against state law enforcement officials and the State of Nevada for searching his home pursuant to a warrant issued by a state court. Applying *Strate* 520 U.S. at 438, and *Montana*, 450 U.S. at 565, this Court held that the tribal court lacked jurisdiction over the State and state officials. *See Hicks*, 533 U.S. at 358, 374.

The Court stated in *Hicks* that "[*s*]*elf*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders." *Id.* at 371 (emphasis in original); *see also id.* at 378 (concurring opinion of Justice Souter quoting *Montana*, 450 U.S. at 564, for the proposition that tribes' inherent governmental authority is preserved over members of a tribe, but generally not over nonmembers); *id.* at 386 (concurring opinion of Justice Ginsburg emphasizing that "the holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law"); *id.* at 391 (concurring opinion of Justice O'Connor contrasting the "nearly absolute tribal sovereignty over tribe members" with tribes' limited sovereignty over nonmembers); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (noting the

distinction between this Court's precedents involving the extent of tribal authority over non-Indians and state authority on Indian lands).

The present case, as noted, involves a tribe's authority over its members and economic affairs, as well as its immunity from compulsory state process. Unlike *Hicks*, moreover, this suit was brought in *federal* (not tribal) court to protect the Tribe's rights under federal law. As this Court recognized in *Hicks*:

> [W]here the issue is whether the [state law enforcement] officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the . . . federal courts . . . to vindicate constitutional or other federal . . . law rights.

533 U.S. at 373.

2. *Montana v. United States*

Similarly, *Montana* concerned "the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547. It did not involve state authority over a tribe or tribal enterprise on a reservation.

Montana holds that tribes generally have no civil jurisdiction over nonmembers on fee-patented lands or their equivalent, except that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians" in two circumstances: (1) where nonmembers "enter consensual relationships with the tribe or its members," or engage in "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. The decision below does not conflict with *Montana* because it does not involve tribal governmental authority of any sort over nonmembers.

II. NONE OF THE PETITIONERS' CLAIMS UNDER 42 U.S.C. § 1983 MERIT REVIEW BY THIS COURT

A. Section 1983 is available to vindicate violations of a tribe's rights under the Constitution

1. The Tribe is entitled to bring a Section 1983 claim

Petitioners challenge the Court of Appeals' holding, claiming that an Indian tribe is not a "person" within the meaning of Section 1983. Pet. at 25. This challenge fails for several reasons. First, it was not raised before the Court of Appeals and therefore is not properly raised here. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (Court practice is "to decide cases on the grounds raised and considered in the Court of Appeals").[15] Second, Petitioners provide no basis for this Court to review this issue. They assert no conflict with a decision of this Court nor any split among the Circuits. Indeed, Petitioners only cite one case—*American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1097 (9th Cir. 2002)—which involved whether an unincorporated tribe is a "citizen" of a state for purposes of federal diversity jurisdiction, not whether a tribe can bring suit under Section 1983.[16] When the Ninth Circuit directly

[15] While the Petitioners made the argument below that Section 1983 was not available for claims of violation of the Tribe's right to self-government and sovereign immunity, they did not challenge the ability of the Tribe or Bishop Paiute Gaming Corporation to bring constitutional claims under Section 1983. Pet. for Reh. En Banc at 15-16.

[16] The court in *American Vantage Companies, Inc.* cited the dissent in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1987), which expresses doubt whether a tribe as a sovereign comes within the meaning of "person" entitled to bring actions under Section 1983. Pet. at 25. However, the dissent in *Williams* opines that a tribe may

addressed the question, it held that tribes *are* persons for purposes of Section 1983.[17] *Native Village of Venetie v. Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *see also Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985) (affirming award of damages to tribe for action brought under Section 1983).

Finally, Petitioners' argument fails to account for the presence of the Bishop Paiute Gaming Corporation as a plaintiff in this case. It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment, *see Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n. 9 (1985), and may vindicate its constitutional rights by suing under Section 1983.[18] *See, e.g., Barrett v. United States*, 689 F.2d 324, 333 (2nd Cir. 1982); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 16 (1st Cir. 1979); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974); *see also* Wright, Miller & Cooper,

bring a Section 1983 action based on its "proprietary, corporate activities." 810 F.2d at 865 n. 16. The Bishop Paiute Gaming Corporation clearly has that capacity here.

[17] In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court construed "person" for purposes of Section 1983 broadly and held that "municipalities and other local government units" come within the definition. *Id.*at 690. In reaching the decision that a municipal corporation was a proper defendant under Section 1983, the Court relied on an Act of Congress which stated that "in all acts hereafter passed . . . the word 'person' may extend to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). There is no principled basis for concluding that the term "persons" who may be plaintiffs should not be construed as broadly as a "person" who may be defendants, and thus to include tribes.

[18] A corporation is also protected from unreasonable search and seizure by the Fourth Amendment. *Silverthorne Lumber v. United States*, 251 U.S. 385, 392 (1920).

Federal Practice and Procedure: Jurisdiction 2d § 3537.1 at 198 ("corporations have protected rights that may be vindicated by suit under § 1983").

2. Petitioners violated the Tribe's rights under the Fourth Amendment

Petitioners challenge the Court of Appeals' holding that the search warrant executed in violation of the Tribe's immunity from suit and right of self-government was also a violation of the Fourth Amendment actionable under Section 1983. Pet. at 26-27. The decision below correctly held that the search violated the Fourth Amendment because it was clearly unreasonable.

"The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 591 (2001). In this case, the warrant was void *ab initio* because the issuing court lacked jurisdiction over the Tribe. *See United States v. Scott*, 260 F.3d 512 (6th Cir. 2001) (search warrant signed by retired judge was void *ab initio*); *United States v. Strother*, 578 F.2d 397, 399 (D.C.Cir. 1978) ("a judicial officer's writ cannot run outside [the officer's] jurisdiction").

The analysis of reasonableness requires a balancing of the interests of the subject of the search against the interests urged to support the search, even in cases involving probable cause. *See Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). The Court of Appeals held that the Tribe's firmly established rights to sovereign immunity and self-government outweighed the Petitioners' interests in the search, particularly in light of the alternate remedies available to the Petitioners to advance those interests. The Petitioners' obtaining and execution of the search warrant in violation of the Tribe's rights and in derogation of its policy was clearly the sort of "misuse of power," *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (quoting *Byars v. United States*, 273 U.S. 28, 33 (1927)), in matters of search and seizure that the Fourth

Amendment prohibits. *See Bissonnette v. Haig*, 800 F.2d 812, 813 (8th Cir. 1986), *aff'd per curiam for lack of quorum*, 485 U.S. 264 (1988) (search and seizure of Indians by U.S. armed forces on Indian reservation was unreasonable under Fourth Amendment in light of legal limits placed on use of military for civilian law enforcement).

Petitioners challenge the Ninth Circuit's determination that the search violated the Fourth Amendment chiefly by relying on *Nevada v. Hicks*, *supra*. Pet. at 22-24.[19] But Petitioners acknowledge that *Hicks* does not authorize search warrants against tribes, *id.* at 24, as distinct from individual Indians, and we showed in Part I.D.1 that *Hicks* does not apply here, because the Tribe is immune from compulsory state process and is not here asserting any governmental authority over Petitioners or any non-Indians.

Since the Ninth Circuit determined that Petitioners violated the Tribe's "rights, privileges, or immunities . . . secured by the Constitution," 42 U.S.C. § 1983, Section 1983 clearly applies. This is not a case where a claim is asserted to a "benefit" or "interest" under a federal statute. *Cf. Gonzaga University v. Doe*, ____ U.S. ____, 122 S. Ct. 2268, 2275 (2002); *Blessing v. Freestone*, 520 U.S. 329, 338 (1997).[20]

---

[19] Petitioners also challenge the Court of Appeals decision below based on an alleged misinterpretation of California law regarding the territorial scope of the jurisdiction of state court judges and magistrates and peace officers. Pet. at 27-28. However, the conclusion challenged by Petitioners is nowhere to be found in the Court of Appeals' decision. It appears that Petitioners are referring to a portion of the initial opinion that was later withdrawn by the court below. *Id.* at 2a, 40a-41a.

[20] Petitioner claims that the Ninth Circuit's decision conflicted with its earlier holding in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir 1989), Pet. at 26, but the Ninth Circuit specifically considered and distinguished *Nevins* because this case involved an unlawful search and seizure outside the officers' jurisdiction. Pet. 6a, n. 4. *Nevins*, by contrast,

B. The Court of Appeals correctly determined that Petitioners lacked qualified immunity

The Court of Appeals applied the two-part test established by this Court in *Saucier v. Katz*, 533 U.S. at 199, and considered "(1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful." Pet. at 3a (citing *Saucier*, *supra* and *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc)).

As noted, the Ninth Circuit first found a Fourth Amendment violation because the warrant "was executed beyond the District Attorney's and Sheriff's jurisdiction." Pet. 3a-4a. As shown in Part II.A.2, that decision was correct under this Court's precedents. The Ninth Circuit then determined that qualified immunity does not apply here because the law was sufficiently clear and that at the time of the alleged conduct a reasonable officer faced with the same circumstances would have known that his or her conduct violates the law. The Court of Appeals applied this standard by relying on *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), and *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp at 1508, as clearly establishing the law in the Ninth Circuit.[21] It determined these cases established clear rules that informed Petitioners that the search warrant was beyond their jurisdiction. Pet. at 4a-5a. As shown *supra* note 7, the

concerned the validity of a state tax on a non-Indian company doing business with a tribe on a reservation, not a violation of the Fourth Amendment.

[21] The Ninth Circuit also relied on the Tenth Circuit's decision in *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990). Pet. 5a-6a.

California courts have also repeatedly applied the tribal immunity doctrine and recognized the absence of state authority over tribes.[22]

Petitioners claim, Pet. at 28-29, that three other decisions—*Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996), *United States v. Snowden*, 879 F.Supp. 1054 (D.Or. 1995), and *United States v. Verlarde*, 40 F.Supp.2d 1314 (D.N.M. 1999), *remanded*, 214 F.3d 1204 (10th Cir.2000)—are inconsistent with the Ninth Circuit's conclusion that the contours of the law were clearly established. Even if true, that furnishes no reason to grant the writ, since a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, the above cases do not support Petitioners' argument. *Crow Tribe* involved a search warrant obtained from a federal court by federal law enforcement officers to enforce federal gaming laws which contain an *express abrogation* of tribal immunity. 87 F.3d at 1044; 25 U.S.C. §§ 2710(d)(6), (7)(A)(ii). In *Snowden* and *Velarde*, the courts found that the tribe had *voluntarily waived its immunity* with respect to the records subject to subpoena. *Snowden*, 879 F.Supp. at 1057; *Velarde*, 40 F.Supp.2d at 1317. In *Snowden*,

[22] This is not a case of mistaken identity in the execution of a facially valid warrant as in *Baker v. McCollan*, 443 U.S. 137 (1979), but rather of a warrant that exceeded clearly established limits to state jurisdiction, as the Ninth Circuit determined. Indeed, the fact that the documents were plainly located in the Tribe's casino located on the Reservation and owned by the Tribe provided Petitioners with sufficient information to determine that the warrant was outside the court's jurisdiction. This Court has held that officials may not rely on a facially valid warrant by a judicial officer to avoid liability under Section 1983. *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (officer is charged with knowing whether warrant requested reasonably established probable cause); *United States v. Leon*, 468 U.S. 897, 922-923 (1984) ("in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued").

for example, the court relied on the consent to their disclosure by the tribal agency provided by the person to whom the records related. 879 F.Supp. at 1058.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

IGRA is the federal statute governing gaming activities by federally recognized Indian tribes.

25 U.S.C. §2706(b) Powers of Commission; monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

* * *

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

* * *

25 U.S.C. §2710(b) Tribal Gaming Ordinances; Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

* * *

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses; (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and (III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

25 U.S.C. §2710(c); Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

25 U.S.C. §2710(d); class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

* * *

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

* * *

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

* * *

(7)(A) The United States district courts shall have jurisdiction over—

* * *

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

25 U.S.C. § 2713(a) Civil Penalties; authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal

regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

* * *

25 U.S.C. § 2716 Investigative Powers:

(a) Confidential information

Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of Title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

2. 25 CFR §556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of a gaming operation.

(a) A tribe shall request from each primary management official and from each key employee of a gaming operation:

(1) Full name, other names used (oral and written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for the previous 5 years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and drivers license numbers;

(3) The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (a)(2) of this section;

(4) Current business and residence telephone numbers;

(5) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;

(6) A description of any existing and previous

business relationships with the gaming industry generally, including ownership interests in those businesses;

(7) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;

(8) For each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any;

(9) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of the application, the name and address of the court involved and the date and disposition;

(10) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (a)(8) or (a)(9) of this section, the criminal charge, the name and address of the court involved and the date and disposition;

(11) The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;

(12) A photograph;

(13) Any other information a tribe deems relevant; and

(14) Fingerprints consistent with procedures adopted by a tribe according to § 522.2(h) of this chapter.

(b) A tribe shall conduct an investigation sufficient to make a determination under § 558.2 of this chapter. In conducting a background investigation, a tribe or its agents shall promise to keep confidential the identity of each person interviewed in the course of the investigation.

(c) If the Commission has received an investigative report concerning an individual who another tribe wishes to employ as a key employee or primary management official and if the second tribe has access to the investigative materials held by the first tribe, the second tribe may update the investigation and update the investigative report under § 556.5(b) of this part.

3. 25 CFR §558.4 Granting a gaming license.

(a) If, within the 30-day period described in § 558.3(c) of this part, the Commission notifies a tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe may go forward and issue a license to such applicant.

(b) If, within the 30-day period described in § 558.3(c) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the tribe has provided an application and investigative report to the Commission

pursuant to § 558.3 (a) and (b) of this part, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

Supreme Court, U.S.
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No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

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Public Law 280 . . . . . 6, 7

REPLY OF PETITIONERS

Respondents Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and the Bishop Paiute Gaming Corporation (collectively referred to as the "Paiute-Shoshone"), clearly do not want the Supreme Court to address the primary issue in this case. That issue, of course, is whether the doctrine of tribal sovereign immunity enables Indian tribes to prohibit the searching of their gaming casinos, resorts, and other businesses and property for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is made by law enforcement officers pursuant to a search warrant issued upon probable cause.

Paiute-Shoshone argue that such a ruling is not necessary because the ruling of the Ninth Circuit in this case – that the doctrine of tribal sovereign immunity does indeed enable Indian tribes to prohibit such searches – is simply a "routine application of this Court's precedents." (Brief in Opposition to Petition for Writ of Certiorari, page 7.)

Petitioners, on the other hand, along with the 12 *Amici Curiae* States of California, Connecticut, Florida, Alabama, Texas, Kansas, Missouri, Nebraska, South Dakota, Nevada, Utah, and Oregon – States from six different Federal Circuits,[1] argue "not so," and show that the ruling of the Ninth Circuit is not an application of Supreme Court precedents at all.

Petitioners and the *Amici* States instead show that tribal sovereign immunity has never, ever, before been found or intimated by the Supreme Court to enable Indian tribes to prohibit the searching of their property by law enforcement

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[1] Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al., filed herein.

officers for criminal evidence of off-reservation State crimes. They argue that the Court should not extend tribal sovereign immunity to so enable tribes to prohibit such searches, and urge that a writ of certiorari issue, and the decision of the Ninth Circuit thereupon be reviewed and reversed.

That these States, from East Coast to West Coast, have spoken to this matter is evidence of its importance to the enforcement of State criminal laws, and its importance will only increase as the tribes and their casinos, resorts, and other businesses continue to expand.

These positions, and additional arguments in support of them, are also presented herein by the *Amici Curiae* brief of the National Sheriffs' Association, which advocates for 3,088 Sheriffs located throughout the United States; and by the Western States Sheriffs' Association (which includes the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah and Washington); and also by the separate joinder in that brief of the statewide Sheriffs and Police Associations of a total of 34 of the 50 United States – representing States from all 11 of the Federal Circuits covering the individual States – including the East Coast States of New Hampshire, Vermont, Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Georgia and Florida; across the South and including the States of Alabama, Arkansas, and Louisiana; from Kentucky, Indiana and Illinois, across the Mid-West including Iowa, Minnesota, Nebraska, Kansas and Missouri; into the Southwest and the States of Oklahoma, Texas, New Mexico and Arizona; and throughout the west from the State of California northward to Oregon and to Washington; and from Idaho and Montana southward to Colorado and Utah.

In total, the law enforcement communities of more than *two-thirds of the States* have presented positions urging this Court to grant certiorari and review this important case.

Additionally, the *Amicus Curiae* brief of the California State Sheriffs' Association, representing all 58 of the elected Sheriffs of California; as well as the *Amicus Curiae* brief of the County of Los Angeles, as joined by the California District Attorneys Association representing all 58 elected District Attorneys of California, and as joined by the California State Association of Counties representing all of the 58 California Counties themselves, present strong additional arguments, and further show that the Ninth Circuit's ruling is not simply a "routine application of this Court's precedents."

There is nothing "routine" about the decision of the Ninth Circuit in this case. If allowed to stand, Indian resorts, hotels, casinos, and other tribal properties throughout the United States will serve as enclaves for the sanctuary of criminal evidence and criminals, immune from search, seizure and arrest, until, and if and only if, the Indian tribe upon whose property the evidence or criminals reside decides to allow law enforcement officials access.

One can only imagine the effect of such a state of affairs. For instance, what if the Washington D.C. area sniper suspects had taken refuge in a tribal hotel or casino?[2] What if a serial murderer, rapist, money launderer, drug dealer, or other perpetrator of State crime seeks refuge for

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[2] According to the San Diego Union-Tribune, October 3, 2002, page 1, the Viejas Indian Band of San Diego County, California, along with 3 other tribes, are in the process of building a $43,000,000.00 Marriott Residence Inn in Washington, D.C., only a few blocks from the Capital.

himself or the bounty or evidence of his crime in tribal hotels, resorts or casinos? Search and arrest warrants will be meaningless and useless in the search for the suspects, and in searching for the bounty, evidence and instrumentalities of the crimes – subject only to the ultimate decision of tribal governments. What if tribal government allowed access, but conditioned access (that is, regulated the performance of law enforcement officers in performing law enforcement duties) only upon certain conditions – such as allowing only an unsafe and tribal-dictated limited number or type of law enforcement officers onto the hotel or casino property, and only at specified times, with only specified weapons, so as not to disturb guests, as the tribe deemed appropriate? Might the suspects slip away during "negotiations" between tribal personnel and law enforcement officials, and the killing and other crime then continue? What if the appropriate tribal personnel are not available to give consent to the search? What if there is intra-tribal dispute as to who has authority to give consent to the search? The effect on the States' ability to investigate and prosecute violations of off-reservation State crime would be enormous.

As presented by the petition for writ of certiorari, and by all of the *Amici* briefs filed herein, the Ninth Circuit's attempt in this case to expand the doctrine of tribal sovereign immunity to enable Indian tribes to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, pursuant to a search warrant issued upon probable cause, constitutes a never before found tribal "right." It represents a serious extension of federalism. and a severe limitation and infringement upon States' sovereignty.

If such a right exists, then it should, respectfully, be left to this Court to declare it, to find it constitutional, and to find that such a right is in keeping with the principles of

federalism and States' sovereignty upon which the nation and the Constitution were founded and formed.

Accordingly, the petitioners, the *Amici* States by and through their respective State Attorneys General, and all other *Amici*, respectfully urge that the petition for writ of certiorari be granted to address this important issue of federal law and States' sovereignty, an issue which should be settled by this Court.

I. THE INDIAN GAMING REGULATORY ACT AND TRIBAL-STATE GAMING COMPACT ARE NOT RELEVANT TO THIS CASE

Paiute-Shoshone go to some length to apprise the Court that the Paiute Palace Casino is operated under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq. ("IGRA"), and also pursuant to a Tribal-State Gaming Compact ("Compact") negotiated with the State of California pursuant to the IGRA. However, neither the IGRA nor the Compact have anything to do with the investigation of off-reservation State crimes (nor to non-gaming on-reservation State crimes, for that matter).

The District Court correctly found that the IGRA is limited by its own terms to gaming regulation, that the criminal investigation and execution of the search warrant herein did not involve gaming regulation, and that the investigation and search warrant instead involved a non-gaming State law felony. (Pet. 63a). The Ninth Circuit agreed with the District Court, and held, as did the District Court, that the IGRA was not applicable to this case or to the arguments being advanced by Paiute-Shoshone. (Pet. 26a).

Further, any inference that the negotiated Compact somehow mitigated the right of the State to investigate off-reservation State crime is without any support. Nothing in the Compact limits or purports to limit the criminal jurisdiction of the State with respect to off-reservation State crime. (ER 142-200).

II. PUBLIC LAW 280 DOES NOT APPLY TO THIS CASE

Paiute-Shoshone also discuss at length several cases involving Public Law 280. However, not a single Public Law 280 case cited by Paiute-Shoshone, or the Ninth Circuit, involves or addresses the rights of States to investigate off-reservation State crimes. The reason for this is simple: Public Law 280 does *not* have any effect or applicability to the rights of the States to investigate and prosecute off-reservation State crime. The Supreme Court has already observed and acknowledged this in *Nevada v. Hicks*, 533 U.S. 353, 365-366 (2001) (Public Law 280 applies only to crimes committed *"in Indian Country"* – italics by Court).

As is well-stated in the Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al.:

> " ... The decision below [by the Ninth Circuit] turned Public Law 280 on its head and trumped this Court's *Hicks* analysis by limiting state jurisdiction to investigate *off-reservation* crimes. Yet Public Law 280, which extends state jurisdiction to *on-reservation* crimes, has no relevance whatsoever to crimes occurring off-reservation and so is not a basis for *limiting* the scope of state authority. In fact, states have "inherent" jurisdiction to execute search warrants, or any other form of process, within Indian country. *Nevada v. Hicks*, 533

> U.S. at 366. No provision of federal law preempts the State of California's authority to do so."
>
> * * * * *
>
> "... The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law-enforcement activity within Indian country--even that which relates to the commission of an off-reservation crime. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of Congress' intent to abrogate tribal sovereign immunity under Public Law 280. <u>But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime</u>... Accordingly, this case has nothing whatsoever to do with attributes of tribal sovereignty Congress may have intended to preserve under Public Law 280 as a matter of statutory interpretation. <u>Rather, this case concerns whether, and to what extent, state sovereignty is diminished by tribal sovereignty as a matter of constitutional law</u>."
>
> Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al., pages 5-8. (Italics in original text; underscoring emphasis added.)

Accordingly, the entire discussion by Paiute-Shoshone, as well as by the Ninth Circuit, regarding Public Law 280 is inapplicable to this case.

III. PAIUTE-SHOSHONE'S CLAIM THAT THE NINTH CIRCUIT OPINION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN *NEVADA V. HICKS* AND *MONTANA V. UNITED STATES* DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THOSE DECISIONS

Paiute-Shoshone also assert that the Ninth Circuit's decision is actually consistent with both *Nevada v. Hicks*, 533 U.S. 363 (2001), and *Montana v. United States*, 450 U.S. 544 (1981). This assertion demonstrates a fundamental misunderstanding of those decisions.

The argument advanced by Paiute-Shoshone is that while *Nevada v. Hicks* and *Montana v. United States* are acknowledged to limit tribal governmental authority over non-Indians, the Ninth Circuit's decision in this case does "not" involve any such tribal governmental authority over non-Indians (i.e., over law enforcement officers and the States), for such prohibition merely "concerns a tribe's control over its members and economic enterprise, which are internal affairs." Brief in Opposition, page 21.

What Paiute-Shoshone fail to grasp, of course, is that by prohibiting law enforcement officers from executing a search warrant issued upon probable cause, tribal government is not only "regulating" the performance of law enforcement duties by those officers (something which this Court in *Nevada v. Hicks* clearly stated that the tribe could not do, *supra*, page 373), it is actually *prohibiting* them from conducting those law enforcement duties.

For the Paiute-Shoshone to say that such conduct "only affects tribal members" is naïve. It totally disregards the interests of the State, and its off-reservation and on-reservation residents, in investigating and prosecuting off-reservation State crime. It also totally disregards the recent ruling of this Court that the State's interest in serving process – search warrants – on the reservation, with regard to the investigation of off-reservation violations of State criminal law, is considerable. *Nevada v. Hicks*, supra, 364.

Portions of the oral argument of the parties before this Court in *Nevada v. Hicks,* on March 21, 2001, are also instructional as to the fallacy of Paiute-Shoshone's contention that its prohibition of a search of its property is entirely "intra-tribal" and affects only its "internal relations." Those portions of the oral argument are set forth in Appendix A, and the points raised therein served as the heart of the *Nevada v. Hicks* decision.

IV. ALL ARGUMENTS ADDRESSING THE ISSUE OF WHETHER THE SEARCH OF TRIBAL PROPERTY BY LAW ENFORCEMENT OFFICERS IS ACTIONABLE UNDER 42 U.S.C. §1983 ARE PROPERLY BEFORE THE COURT

In its decision below, the Ninth Circuit raised and decided, *sua sponte,* the *issue* of whether the tribe may state a claim for violation of its civil rights arising from the alleged unlawful search of its property by law enforcement officers pursuant to the search warrant. (Pet. 6a and 42a).

Having done so, and contrary to the claim of Paiute-Shoshone (Brief in Opp., n.15, page 24), all *arguments* addressing that issue are properly before this Court, whether

or not they were a subject of petitioners' Petition for Rehearing *En Banc* at the Ninth Circuit. *Virginia Bankshares, Inc. v. Sandburg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Such arguments include whether or not a tribe has standing as a "person" under 42 U.S.C. §1983 to make a claim under the statute, and also include without limit the argument raised in the Petition for Rehearing *En Banc* that neither the tribal right to self governance, nor the claimed tribal right of sovereign immunity from search pursuant to search warrant, if it exists, is a constitutional or statutory right that will support a 42 U.S.C. §1983 action.

Additionally, even though standing as a "person" may not have been raised below, the Court is obliged to examine standing *sua sponte* where standing has erroneously been assumed below. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998).

CONCLUSION

For the reasons set forth above, in the petition for writ of certiorari, and in the briefs of *Amici Curiae,* the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-1994

Washington, D.C.
Wednesday, March 21, 2001

STATE OF NEVADA, ET AL.)
Petitioners)
)
v.)
)
FLOYD HICKS, ET AL.)
)

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

C. WAYNE HOWLE, ESQ., Carson City, Nevada; on behalf of Petitioners.

S. JAMES ANAYA, ESQ., Tucson, Arizona; on behalf of the Respondents.

BARBARA MCDOWELL, ESQ., Assistant to the Solicitor General, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting affirmance.

* * * *

Beginning at page 15, line 2:[1]

> QUESTION: I certainly wouldn't think that the state's ability to enforce criminal laws off the reservation is going to be dependent upon whether a tribal court will deign to issue a search warrant or not. I mean, that would be a tremendous incursion upon the state's sovereignty that it can't enforce its criminal laws unless it gets a tribal court to let it go on and search for the offense.
>
> MR. HOWLE: Exactly. And that's the position we have --
>
> QUESTION: I assume that to be pretty clear law.
>
> MR. HOWLE: Yes. Another point we've made is the way that this --
>
> QUESTION: Where did you take that position, because I didn't see the --
>
> MR. HOWLE: I'm sorry. It's on page eighteen of my reply brief, in the second paragraph. The argument also incorrectly

[1] Transcript of oral argument, In the Supreme Court of the United States, Wednesday, March 21, 2001; www.supremecourtus.gov/oral_arguments/argument_transcripts/99-1994.pdf

> assumes state officials are powerless to pursue state law enforcement objectives on a reservation, except with the tribe's consent. And here I've identified the fact that states do have authority over off-reservation crimes committed by tribal members, and that reservations are part of the state within which they occur.

* * * * *

Beginning at page 26, line 5:

> QUESTION: Well, the petitioner says they didn't even need to get tribal court permission to get a search warrant.
>
> MR. ANAYA: We disagree, and the authority of this Court will indicate the contrary.
>
> QUESTION: And what do you rely on?
>
> MR. ANAYA: Williams v. Lee, and its progeny, Your Honor, which establishes clearly that the sovereignty of tribes precludes the authority of the state to the extent it interferes with the ability of the tribe to make its own laws and be governed by them.
>
> QUESTION: But it's not governed by its own criminal laws insofar as a crime that occurs off the reservation is concerned. Could this tribal court have tried this crime?

MR. ANAYA: Your Honor, the tribal court – if this were a crime under tribal law, and it is not a crime under tribal law as far as I know.

QUESTION: The tribe can make off-reservation crimes a crime under tribal law triable in the tribal court?

MR. ANAYA: It could as to members, perhaps.

QUESTION: Oh, crimes by members.

MR. ANAYA: By members.

QUESTION: Not crimes against members.

MR. ANAYA: Yes, Your Honor.

QUESTION: And what if they did make it triable in tribal court -- would the state still be able to prosecute it as a violation of state law?

MR. ANAYA: The state could, in any instance, prosecute this case. What is at issue here is whether it can go onto the reservation to execute a warrant.

QUESTION: Well, the state's ability to prosecute is not worth a whole lot if it leaves [needs] the by your leave of somebody else to go and grab the person who allegedly did the offense.

MR. ANAYA: That may be.

QUESTION: That's what you're saying -- that the state is entirely at the mercy of the tribal court to get a search warrant, and I presume an arrest warrant as well.

MR. ANAYA: Yes, Your Honor, that is what I'm saying.

QUESTION: That's quite an incursion on the state's criminal jurisdiction, it seems to me.

[Note by Petitioners: The points raised by the Court's questioning above served as the heart of the Court's opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001), at pages 363-364.]

Supreme Court, U.S.
FILED
OCT 21 2002
OFFICE OF THE CLERK

No. 02-281

In The

Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF
Petitioners

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL. IN SUPPORT OF THE PETITIONERS

The National Sheriffs' Association, et al. respectfully submit this *amici curiae* brief in support of Petitioner, Dan Lucas, individually and as elected Sheriff of Inyo County, California. Pursuant to Supreme Court Rule 37.2.(a), this *amici curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*[2]

The National Sheriffs' Association is a § 501(c)(4) non-profit association, formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriff throughout the United States. The NSA has over 21,000 members, and is the advocate for 3,088 sheriffs throughout the United States.

The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the country. The National Sheriffs' Association participates in judicial processes where the vital interests of its members are affected.

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with the Supreme Court Rule 37.6, NSA represents that no counsel for any party authored this brief in whole or in part, and the following made monetary contribution to assist in the costs of counsel employed to prepare and submit this brief: Western State Sheriffs' Association.

[2] For a list of all of the sheriffs' organizations who join as *amici curiae*, please see Appendix A.

The office of sheriff is one of the oldest offices known in the common law system of jurisprudence; and the modern office of sheriff is a peacekeeper and serves and executes official court documents. Throughout the nation, the office of sheriff has retained the responsibility of being the primary law enforcement organization which secures the order and safety of the local community.

In the normal course of his civil and criminal duties and jurisdiction, a sheriff or deputy is required frequently, on a daily basis, to serve and execute writs, subpoenas, summonses, search warrants and other facially valid court papers. This Court will not be surprised to learn that, in the course of a year, the several sheriffs and their deputies serve and execute millions of facially valid court papers. The petitioner, Sheriff Lucas, individually and in his official capacity as the elected Sheriff of Inyo County, California, was – through his deputies – carrying out the statutory and constitutional duties of the office of sheriff by assisting in the service and execution of a facially valid search warrant, and is therefore entitled to the defense of qualified immunity under 42 USC § 1983.

The Western States Sheriffs' Association[3] is interested in this *Amici Curiae* brief because of the prevalence of Indian Lands in their jurisdictions. The sheriffs, who are members of more than 30 state associations found in Appendix A, are also intensely interested in the important issue of the service and execution of facially valid search warrants.

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[3] The Western States Sheriffs' Association includes Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wyoming.

The *Amici Curiae* believe they can be of assistance to the Court in this case regarding the sheriff and his deputies' qualified immunity surrounding the service of a facially valid search warrant secured by another. The failure of the Ninth Circuit to sustain the petitioner's defense of qualified immunity, under the facts of this case, could have far-reaching adverse effects on the membership of the National Sheriffs' Association if this Court does not reverse.

REASON FOR GRANTING CERTIORARI

This Court should grant *certiorari* first to conclusively establish that its ruling in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) controls the facts of this case. This Court has never ruled on the propriety of the service of a facially valid search warrant on Indian Tribal Governments, their casinos or other offices and businesses.

Equally as important, this Court should reverse the erroneous opinion of the Ninth Circuit regarding the doctrine of qualified immunity. In this case, Sheriff Lucas and his deputies should have been afforded qualified immunity, particularly since they were assisting with a facially valid search warrant which had previously been obtained and served by investigator Nixon.

It is the failure of the Ninth Circuit to recognize the doctrine of qualified immunity, when the search warrant was facially valid, which is the focal point of this *Amici Curiae* brief. This is particularly true in light of *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), where this Court recently reversed another Ninth Circuit holding which failed to appreciate the proper contours of qualified immunity.

ARGUMENT

THE PETITIONER SHERIFF AND HIS DEPUTIES WERE ENTITLED TO QUALIFIED IMMUNITY REGARDING A FACIALLY VALID SEARCH WARRANT

Three Paiute-Shoshone Indians, working as employees at the Paiute Palace Casino, in Inyo County, California, failed to report income received as wages from the casino and, as such, violated California state law because they were concurrently receiving wages and public welfare assistance from the state.

Investigator Leslie Nixon, of the Inyo County District Attorney's Office, requested the employees' payroll documents from the casino, but was denied. Therefore, she obtained a search warrant from the California Superior Court which authorized a search for the three employees' records at the casino. When investigator Nixon attempted to execute the search warrant, the casino rebuffed her by claiming sovereign immunity and denying her access to an out-building where the employee records were actually located.

Investigator Nixon then called the office of Sheriff Lucas and deputies were dispatched to assist and to maintain peace and good order. The deputies inspected the search warrant, concluded it was facially valid, and secured bolt cutters, which the assistant DA then used to cut the padlock, whereupon the appropriate records were seized by Nixon.

The Paiute-Shoshone lost a declaratory judgment/ injunctive relief case in the U.S. District Court, but that decision was appealed and reversed by the Ninth Circuit, which also countenanced the right of the tribe to seek a money judgment against the Sheriff and his deputies under the federal civil rights statute, 42 U.S.C. § 1983.

A. Background of Qualified Immunity

The doctrine of qualified immunity provides a full defense if a defendant's conduct did " . . . not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). (Emphasis added.) Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines and qualified immunity "'. . . protects all but the plainly incompetent . . . .'" *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589, 596 (1991) (*per curiam*) (citations omitted).

The district court below was correct when it concluded that ". . . the sheriff has qualified immunity because his department merely executed a facially valid search warrant signed by the magistrate." *Petition for Writ of Certiorari*, Appendix A, p. 58a.

In *Saucier v. Katz*, *supra*, this Court again visited the important doctrine of qualified immunity and, in reversing the same Ninth Circuit whose ruling brings us here, this Court clearly enunciated a three-step qualified immunity test:

1. Did the official violate a constitutional right (viewing the facts in a light most favorable to the plaintiff)?

2. Assuming the trial court answers question one affirmatively,[4] was the constitutional right clearly established in the specific context of the case?[5]

3. If the official makes a mistake about what is legal, was such a mistake reasonable under the circumstances facing the official?

This Court also reminded that the privilege ". . . is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985). (Emphasis in original.) As a result, " . . . we repeatedly have stressed the importance of resolving immunity at the earliest possible stage in litigation." *Hunter v. Bryant*, *supra* at 227, 112 S. Ct. at 536, 116 L. Ed. 2d at 595.

B. The Ninth Circuit Erroneously Concluded That Respondents Had A Right To Be Free From A Facially Valid Search Warrant

Incorrectly citing *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838, 114 S. Ct. 119, 126

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[4] As the *Saucier* Court pointed out, if a trial court cannot establish a constitutional violation, then there is no further inquiry required and the official prevails. *Saucier*, *supra* at 201, 121 S. Ct. at 2156, 150 L. Ed. 2d at 281.

[5] Importantly, where a state official is accused of a violation of a citizen's "rights," this Court requires that a plaintiff "particularize" the right so that "The contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed.2d 523, 531 (1987).

L. Ed. 2d 84 (1993) as the basis for finding that the respondents' constitutional rights were violated by petitioners, the Ninth Circuit ignored the controlling law of *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). By so doing, the Ninth Circuit erred by directly contravening both *Nevada* and *Saucier*. Had the Ninth Circuit correctly followed the *Nevada* decision, it would have declared no violation of any constitutional rights by the sheriff or his deputies; and the district court's ruling would have been summarily affirmed.

In *Nevada*, this Court held that state officers were permitted " . . . to investigate or prosecute violations of state law occurring off the reservation." *Id.* at 365-66, 121 S. Ct. at 2313, 150 L. Ed. 2d at 411. This is the fact pattern existant here, namely that the search warrant was served because of a violation – off reservation – of California state criminal law. *Nevada* held that there is no tribal sovereign immunity which would permit a court to prohibit the search of its property for criminal evidence of "off-reservation" state crime.

The Ninth Circuit's ruling to the contrary should be corrected by this Court.

C. Respondents Had No Clearly Established Right To Avoid Service Of A Facially Valid Search Warrant And Therefore Petitioner Was Entitled To Qualified Immunity

Assuming, *arguendo*, that respondents had a constitutional right to be free from the search warrant, was the second test satisfied, *i.e.*, was that right "clearly established?" The answer is "no" because in *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), this Court established that there was no constitutional right implicated by the mistaken arrest of

a citizen, so long as the officer possessed a facially valid arrest warrant. This Court found that a sheriff, executing such an arrest warrant, was not " . . . required by the Constitution to investigate independently every claim of innocence whether the claim is based on mistaken identity or a defense such as lack of requisite interest." *Id.* at 145-46, 99 S. Ct. at 2695, 61 L. Ed. 2d at 442.

Since *McCollan* protects state officials who serve facially valid arrest warrants which deprive persons of their liberty, it is even more appropriate that sheriffs and their deputies be protected when they serve facially valid search warrants which deprive persons only of their property. As such, the petitioners here are entitled to qualified immunity because respondents have no clearly established constitutional right to avoid a facially valid search warrant. *See e.g.*, *Aleotti v. Baars*, 896 F. Supp. 1, 6 (D.D.C. 1995), *aff'd*, 107 F.3d 922 (1996).

D. The Petitioner Sheriff Or His Deputies Could Reasonably Have Believed That They Were Not Violating Respondents' Fourth Amendment Rights

The third test of the qualified immunity doctrine holds that if a reasonable person standing in the shoes of the sheriff or his deputies would not have known that his conduct was constitutionally impermissible, then qualified immunity protects them. *Harlow v. Fitzgerald*, *supra* at 818, 102 S. Ct. at 2738, 93 L. Ed. 2d at 410. However, the Ninth Circuit erroneously ruled that the Sheriff could not reasonably have believed that he was not violating respondents' Fourth Amendment rights. The facts do not support that finding.

First of all, Sheriff Lucas was not even on the scene; secondly, his deputies were called by investigator Nixon after she secured the facially valid warrant from the California

Superior Court, and became concerned about a possible disturbance. The deputies arrived, viewed the facially valid search warrant and expressed their belief that it was proper.

These actions by sheriff's deputies were reasonable, as a matter of law, because the deputies correctly perceived "all of the relevant facts," and even if this Court finds that the deputies had a "mistaken understanding" whether the facially valid search warrant was "legal in those circumstances," such a mistake was reasonable and "the officer is entitled to the immunity defense." *Saucier* at 205, 121 S. Ct. at 2158, 150 L. Ed. 2d at 284.

In this day and age, where innumerable facially valid search warrants must be served daily by sheriffs' offices throughout the country, sheriffs and their deputies must not be "chilled" from doing what to them appears reasonable. It is submitted that nothing is more reasonable than serving a facially valid search warrant.

CONCLUSION

Unless this court reverses the Ninth Circuit's decision to deny Sheriff Dan Lucas and his deputies the defense of qualified immunity – a ruling which squarely conflicts with the bright line tests of *Saucier* – thousands of this Nation's sheriffs will be unable to perform daily their constitutional and statutory duties with any degree of confidence.

Because the Ninth Circuit erroneously denied the sheriff and his deputies qualified immunity regarding a facially valid

search warrant, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 21, 2002

APPENDIX

APPENDIX A

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Includes: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wyoming

Alabama Sheriffs' Association
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Montgomery, AL 36104-4385

Arizona Sheriffs' Association
1109 Arizona Avenue
Parker, AZ 85344-5743

Arkansas Sheriffs' Association
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Minnesota State Sheriffs' Association
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Supreme Court, U.S.
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No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, CALIFORNIA STATE SHERIFFS' ASSOCIATION, IN SUPPORT OF PETITIONERS

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INTRODUCTION

The opinion of the Ninth Circuit Court of Appeals serves to establish hundreds, and with the growth of so-called "Indian Land" perhaps many more, tribal enclaves that are now virtual sanctuaries where evidence, or even the perpetrators, of off-reservation (as well as on-reservation) criminal acts may be secreted, immune from a search by law enforcement officers who are investigating the violation of state crimes. And this is so even where, as here, those state law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves of a safe haven for the secretion of evidence and perpetrators are not limited to some remote wilderness, desert or high plains prairie where the issue is seldom likely to arise. Rather, they include tribal commercial gambling casinos, which are proliferating throughout the nation, other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and other Indian country[1] within the Western States comprising the Ninth Circuit.

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[1] Amici use the term "Indian country" as a term of art commonly used by Native Americans and others to describe land over which a Native American tribe asserts dominion.

REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF PETITIONERS COUNTY OF INYO, ET AL

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity vis-a-vis state law enforcement investigation of state crimes is crucial in its impact on all 58 counties that comprise the State of California. This is because every state law enforcement official . . . the sheriff in each of the 58 counties in California, any one of the more than 400 municipal chiefs of police throughout California, any one of the state level law enforcement officials such as the California Department of Justice, the California Highway Patrol, the State Department of Motor Vehicles, the State Park Police, the Department of Fish and Game, just to name but a few . . . may find him/herself either investigating a crime or seeking a perpetrator on Indian land within his/her home county, or may even in the case of an official in a metropolitan jurisdiction, find him/herself pursuing an investigation and/or a perpetrator onto Indian land, albeit not within the home county.

Your Amici, the California State Sheriffs Association (CSSA) represents every elected sheriff of the 58 counties of the State of California serving a population of more than 34 million people throughout an area encompassing more than 163,000 square miles. CSSA is familiar with the questions of law and fact involved in this case and how the resolution of the questions presented herein may affect the entire law enforcement community.

This case raises an issue of critical importance to law enforcement agencies in the State of California and the public they serve: Whether the doctrine of tribal sovereign immunity enables Indian tribal officials to prohibit state law enforcement

officials, armed with a search warrant duly executed by a magistrate in full compliance with the Fourth Amendment, from searching tribal-owned/operated premises and/or facilities for evidence, or the perpetrator, of a state law violation.

Indeed, the decision of the Ninth Circuit in this case has such far reaching and potentially dire consequences, and is of such national importance, that the rule of law regarding search of "Indian land" pursuant to warrant must be settled by this Court.

It is for these reasons that this case is one appropriate for the Court's grant of certiorari, and is one which is furthermore most appropriate to amicus curiae briefing. Therefore, while joining in the briefs submitted by Petitioner County of Inyo, et al, as well as those of other potential amici such as the National State Sheriffs Association, the California State Sheriffs Association requests leave of this Court to appear as amicus curiae on behalf of Petitioner.

THE NINTH CIRCUIT DECISION RENDERS ILLUSORY THE PROMISE OF PUBLIC SAFETY IMPLICIT IN PUBLIC LAW 280

Title 18 U.S.C. § 1162 provides that so-called Public Law 280 states have jurisdiction to enforce state penal statutes on Native American tribal lands. What this means in its simplest terms is that state law enforcement authorities in a Public Law 280 state have jurisdiction to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory. Id. It is important to

note that, unlike three of the six states enumerated in Public Law 280, California was given jurisdiction over "*all* Indian country within the State" (emphasis added) (Id.), whereas the statute excluded certain Indian lands from the criminal jurisdiction of other states.

That this law was enacted, and that this grant of state law enforcement authority was extended to tribal lands, is founded in the policy of ensuring that law enforcement protection on tribal lands was adequate to serve the needs of tribal members and the public interest. 106 Senate Report 327. But § 1162 is simply one manifestation of Congress' continuing concern with the welfare of Indian tribes under federal guardianship. Indeed, in adopting § 1162, Congress singled out certain reservations to remain subject to federal criminal jurisdiction. Congress' selective approach in § 1162 reinforces, rather than undermines, the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution. Furthermore, as stated by the Ninth Circuit Court of Appeals itself, Congress delegated to the States broad powers over criminal matters "because Congress' primary concern lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement. . . ." Confederated Tribes of Colville Reservation v. State of Wash., 938 F.2d 146, 147 (9th Cir. 1991).

To find that Public Law 280 would on the one hand confer on state officials criminal law enforcement authority on Indian land while at the same time countenance that this authority could be lawfully thwarted by the simple device of a tribal official asserting immunity as to records -- or tomorrow, perhaps a perpetrator – held behind lock and key is a legal absurdity and renders the promise of public safety implicit in the enactment of Public Law 280 illusory and of no

more substance, duration or meaning than a puff of smoke.

THE NINTH CIRCUIT DECISION NULLIFIES THE POLICY OF RIGHTS AND RESPONSIBILITIES INHERENT TO OUR SYSTEM OF ORDERED LIBERTY

The issue before this Court strikes at principles rooted in the foundation of our Republic, the framing of the Constitution and the establishment of our system of ordered liberty.

The Framers -- John Adams, Thomas Jefferson and others -- did not fashion a governmental framework such as ours out of whole cloth. They drew their inspiration from the influence of the major social philosophers of their time; writers such as John Locke and Jean-Jacques Rousseau.

Under the social theories of John Locke, civil liberty and natural liberty depend on compliance with valid restraints. According to Locke, laws must comport with natural right, while procedurally they must issue from a duly constituted authority, such as a government or a legislature established by a social contract. Any interference with someone's actions requires a valid reason, and procedural liberty is the right of living under a duly constituted government. (Peter Laslett, Introduction to John Locke, Two Treatises of Government 46-49 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). Simply stated, Locke's social contract stands for the principal that to enjoy the benefits of society, one has to be prepared to sacrifice that measure of natural liberty necessary to transition to ordered liberty.

Similarly, Rousseau observed that "The passage from the state of nature to the civil state produces a very

remarkable change in a man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great." (Rousseau, The Social Contract, 1762)

"Ordered liberty provides for freedom within assumed societal goals and values as opposed to freedom from assumed goals and values. Specifically, ordered liberty permits cultural pluralism within boundaries that the majority is willing to tolerate, so that the liberty we are afforded is not unfettered, but rather bounded by prevailing social dictates. "The Seattle Compromise: Multicultural Sensitivity and Americanization, Doriane Lambelet Coleman, 47 Duke L.J. 717 (1998).

Lockean theory continues to be recognized and embraced to the current time, as seen in City of Boerne v. Flores, (1997) 521 U.S. 507, a case dealing with religious exercise, wherein the theories of John Locke were referred to as "the right to do only what was not lawfully prohibited," (West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. of Law, Ethics & Public Policy 591, 624 (1990)). The social theories of both Locke and Rousseau on submission to governance by the consent of the governed were commented upon by the Eleventh Circuit Court of Appeals in its 1993 decision in United States v. Forney, (11th Cir., 1993) 9 F.3d 1492, 1508 "The consent theory of government, expounded by philosophers such as John Locke and Jean Jacques Rousseau and adopted by our founding fathers, supports the concept of a government *entrusted* by the people with carrying on the affairs common to us all."

Against this backdrop, recall that Public Law 83-280 was enacted "because Congress' primary concern lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement . . . ." Confederated Tribes of Colville Reservation v. State of Wash., supra at 147. This law was, then, enacted expressly to help Native Americans living on reservations move from a state of lawlessness to one of the rule of law. This is consistent with the philosophy so influential to the Framers where to receive the benefits of ordered liberty one moves from the "natural state" to the civil or societal state, to the system of burdens, benefits, checks and balances we know as "ordered liberty." This is to the end that, to paraphrase the philosopher Cato, the government – "'a Few'" – might attend upon the affairs of all so that everyone might, with more security, live their lives in an environment of societal health, welfare and safety." (Thomas Gordon, Cato's Letter, No. 38, 22 July 1721, reprinted in 1 Phillip B. Kurland & Ralph Lerner, The Founders' Constitution, at 46 (1987))

Yet what the Circuit Court of Appeals has accomplished through its decision is to establish that investigation of any crime and/or arrest of any alleged perpetrator can at any time be thwarted by a "tribal" official placing evidence and/or the perpetrator of such criminal offense behind the barrier of a "tribal" veil; and, by so doing, to thwart our system of ordered liberty.

In this instance, the investigation was of welfare fraud alleged to have been committed by tribal members. In the next instance it could, on the Ninth Circuit's reasoning, as easily be a crime or arrest where the victim is a tribal member. For there would be nothing to prevent a tribal official from deciding that the investigation is unwarranted; that the perpetrator is innocent; or, that the perpetrator is a

tribal official -- or a friend or relative of a tribal official -- and so is deserving of being shielded behind a "tribal" door. This, then, becomes the rule of men rather than the rule of law.

If this be thought a hyperbolic stretch, then subject the Circuit Court's reasoning to the challenge of "if not, why not." If the tribal official in the instant case can do this, and not only be free from penal sanction, but be entitled to civil relief as the "victim" of police misconduct, why then cannot the same or another tribal official in any Public Law 280 state be free to declare tribal sovereignty as a bar to a criminal investigation which, for any reason or none, the tribal official decides will not go forward? In fact, there would be nothing to prevent a fleeing felon from claiming "sanctuary" from inside the casino doors.

To reject this argument on the basis that no tribal official would do so can only be met with the challenge that one asks of the Inyo County officials: did they ever imagine that a "tribal" official would have barred their way when executing a duly authorized search warrant for criminal evidence held in that "tribal" file cabinet.

And the net effect of this is not simply to deprive state governments of police authority over tribal lands and tribal members. The broader effect of this is to deprive tribal members, as well as every other citizen of such a state, of the benefits, as well as to relieve them of the burdens, of ordered liberty. It is to potentially take tribal lands and return them to the condition of lawlessness which Congress specifically sought to prevent in enacting Public Law 280. It is to nullify the social contract which lies at the heart of our system of liberty and governance.

INYO COUNTY OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY

In order to defeat a qualified immunity defense, the plaintiff must demonstrate that the right alleged to have been violated was established in a particularized way. Anderson v. Creighton, (1987) 483 U.S. 635(on remand 724 F.Supp. 654 (D. Minn. 1989); Lopez v. Robinson (4th Cir. MD 1990); Nicholson v. Georgia Department of Human Resources, (11th Cir. GA 1990) 918 F.2d 145. It is insufficient for a plaintiff to advance a violation of a broad abstract right even though it is clearly established in a generalized sense. Anderson v. Creighton, supra.

Before a defendant can be denied qualified immunity on a claim of violating a plaintiff's right, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. It is therefore essential to avoid abstraction in the determination of claims of qualified immunity in favor of "studying how these abstractions have been applied in concrete circumstances." Barts v. Joyner, (11 Cir., 1994)(cert. Denied, 493 U.S. 831(1989)). See also Cooper v. Dupnik, (9th Cir. 1991) 924 F.2d 1520, 1583 ["closely analogous cases, decided before the defendant acted . . . are often required to find a constitutional or statutory right is clearly established"]; and, Auriema v. Rice, (7th Cir. 1990) 910 F.2d 1449 ["The test for (qualified) immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted."].

This Court's ruling in Malley v. Briggs, (1986) 475 U.S. 335, defines the meaning of the term "reasonable official" in this context: it means an official who stands outside the realm of "the plainly incompetent or those who

knowingly violate the law . . . " 475 U.S. at 341. In order to deny an official the ample protection of the rule of qualified immunity, it must be obvious to any but the plainly incompetent official that the given conduct is violative of "clearly established law." If officials of reasonable competence can disagree, immunity must be recognized. As the court stated in Romero v. Kitsap County, supra., 931 F.2d at 627-28, two of the primary inquiries in considering the defense of qualified immunity, i.e., the identification of the specific right allegedly violated and the determination of whether that right was so clearly established as to alert a reasonable officer to the constitutional parameters of that right, "present pure questions of law."

In this light, consider the conduct at issue in this case. The Inyo County officials, once confronted with the refusal of the tribal casino officials to disclose the employment records being sought, did not bull-dose their way forward with some flagrant display of force and in complete disregard for the Fourth Amendment rights of the tribal casino employer. They politely and discretely withdrew, and then did what every court in this nation has for decades been telling police officers to do; they went to a magistrate for approval of a search warrant based on probable cause. Once that state magistrate . . . for, after all, the sheriffs deputies were seeking to enforce a state penal statute . . . issued that warrant commanding the search at issue, the officials returned to the casino, where they were again met with the refusal of "tribal" officials to give them access to the records identified in the search warrant. The sheriffs officials then did what any police officer would do under the circumstances, and cut the lock to the records.

Confronted with these circumstances, what would a reasonable law enforcement official have known? They would

have known that:

- They were investigating an alleged violation of a state penal statute, namely welfare fraud.

- They would have known that they had a court issued search warrant, which their training and experience would have told them was required by the Fourth Amendment.

- They would have known that more than four decades earlier Congress had enacted Public Law 83-280 naming six states, California among them, as having law enforcement jurisdiction over state law violations occurring on tribal lands, or alleged to have been committed by tribal members.

- They would likely also have been aware of the holding by the Ninth Circuit Court of Appeals itself, stating that "[i]f the law is classified as criminal/prohibitory, California possesses jurisdiction under Pub.L. 83-280, § 2, 18 U.S.C. § 1162 (1988) and may enforce the fireworks law." Quechan Indian Tribe v. McMullen, (9th Cir., 1992) 984 F.2d 304.

- And, such officials likely would have been aware of this Court's earlier holding in California v. Cabazon Band of Mission Indians, (1987) 480 U.S. 202, in which, while disallowing state enforcement of regulatory statutes governing gaming, reaffirmed the principal that Public Law 280 states, such as California, do have enforcement power on tribal lands and as to tribal members insofar as concerns state criminal statutes.

In the face of such knowledge, circumstances, and prior decisional law, it cannot be fairly stated that a reasonable official in this situation would have known that his conduct violated a clearly established and particularized constitutional right of a tribe and/or tribal official to be at liberty to refuse compliance with a duly authorized order of the state court magistrate. Therefore, for these reasons, and based on established law, on in support of Petitioners County of Inyo, et at, and speaking on behalf of all 58 California sheriffs, any one of whom or their respective staffs with find themselves similarly situated, these amici urge this Court to set aside the decision of the Court of Appeals and direct that the individually named Petitioners be granted qualified immunity.

CONCLUSION

For these reasons, as well as those expressed by Petitioner and such other amici as the Court may hear on behalf of Petitioner, together with such oral argument as the Court may be pleased to entertain, Amici California State Sheriffs Association respectfully urge the Court to set aside the ruling of the Ninth Circuit Court of Appeals and order judgment in favor of Petitioner, or, at the least, find that the individually named Petitioners are entitled to the defense of qualified immunity.

Respectfully submitted,

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No. 02-281

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In The
Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,

Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, FLORIDA, KANSAS, MISSOURI, NEBRASKA, NEVADA, OREGON, SOUTH DAKOTA, TEXAS AND UTAH IN SUPPORT OF THE COUNTY OF INYO, ET AL., PETITIONERS

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

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BRIEF OF *AMICI CURIAE*

The States of California, *et alia*, respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The *Amici* States address only the first two questions presented by Petitioners.

INTEREST OF THE *AMICI CURIAE*

The decision below poses a real threat to the integrity of *Amici* States' sovereignty reserved by them under the Constitution, and to their authority to discharge their day-to-day governmental responsibility to investigate criminal activity. *Amici* States are obligated to enforce their criminal laws outside Indian country and to provide governmental services to non-Indians; in addition, the *Amici* States with authority under Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, must also enforce their criminal laws within Indian country. All *Amici* States are thus required to have a substantial and vital presence within Indian country. While this presence regularly exposes states to tribal assertions of sovereignty, and likely always will, tribal sovereignty should not be permitted to interfere with core state functions such as the investigation of criminal activity.

The court of appeals would establish another twist in the convoluted history of jurisprudence concerning state jurisdiction in Indian country. The United States Constitution grants to the federal government authority over Indian affairs. In the exercise of this authority, the federal government has, throughout the history of the United States, implemented dramatic shifts in its Indian policy

which have caused jurisdiction over Indian country to be among the most confounding issues in tribal-state relations. Following independence, the United States retained the British Crown's concept of Indian country, which drew a line along the Appalachian Ridge beyond which the sovereign claimed to exercise no political control. Later, the federal government segregated tribes by placing them on reservations that non-Indians were prohibited from entering without permission from the federal government. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (denying Indians personhood under the Fourth Amendment). Next, the federal government attempted to assimilate tribes into non-Indian society by abolishing reservations and tribal governments and selling tribal land to individuals. General Allotment Act, 24 Stat. 388 (1887). In the first half of the Twentieth Century, when the failure of the "allotment policy" was clear, the federal government began restoring its relations with tribal governments and returning lands to tribes. Indian Reorganization Act of 1934, 48 Stat. 984 (1934). The effects of these policy fluctuations were enormous. Under the allotment policy, for example, a substantial portion of reservation land passed out of tribal ownership. *See generally* Francis Paul Prucha, The Great Father 896 (1984) (summarizing the types and amounts of land transferred by 1934). Accompanying this destruction of exclusive tribal territory, was the elimination of tribal members' political separation through individual grants of United States citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

These shifts in federal Indian policy, and their resultant transformation of Indian country, have resulted in a

jumbling of Indian and non-Indian lands, and a blurring of the laws that govern jurisdiction within Indian country. Non-Indians residing on former tribal lands may find themselves subject to claims of regulatory or taxing authority by tribal governments in which they have no right to participate. Meanwhile, tribal governments do not provide the full range of services and protections one generally expects a state government to provide. For example, tribal governments are barred from enforcing criminal laws against non-Indians. These voids are not insignificant. The 1990 census indicates that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, 1990 Census of Population, General Population Characteristics, United States 541 (Nov. 1992). In addition to non-Indians, tribal members also look to states and their political subdivisions to provide governmental services, including the provision of law enforcement services.

The decision of the Ninth Circuit Court of Appeals below presents these concerns in stark relief. The execution of a search warrant, issued on probable cause, in the course of an investigation of an off-reservation crime, for the search of tribal buildings and for the seizure of tribal property within the boundaries of Indian country, would appear to fall squarely within what this Court described only last year as the "inherent" authority of the State. *Nevada v. Hicks*, 533 U.S. 353, 366 (2001) ("*Hicks*"). Yet the decision of the court of appeals, that tribal *sovereign immunity* bars the execution of such a search warrant, has undermined *Hicks*' clear guidance – and in the process thickened the jurisdictional haze – hampering meaningful

enforcement of criminal laws within the boundaries of Indian country to the detriment of law abiding citizens everywhere.

The decision below raises two immediate concerns for Californians and for the residents of many of the *Amici* States. First, the conflict between the decision below and the *Hicks* decision renders uncertain the extent of state authority to serve search warrants in Indian country. Secondly, the court of appeals' faulty analysis of Public Law 280, and the related finding of personal liability in the county officers, will chill the conduct of on-reservation law enforcement activities in all states. It is often the case in California and in other Public Law 280 states, where the federal government has no regular law enforcement presence, that county sheriffs are the only providers of law enforcement within Indian country. If the *Bishop Paiute* decision is not reviewed, it will remain a strong disincentive to sheriffs' deputies considering entering Indian country – with profound public safety implications for reservation populations.

The decision below also raises the specter of Indian country becoming a safe haven for criminals operating under the cloak of tribal status. The widespread potential for abuse is difficult to overstate. Within the ten continental states of the Ninth Circuit, there are 398 Indian tribes occupying approximately 36 million acres of territory. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). In California alone, the Bureau of Indian Affairs has before it 87 pending applications for the acceptance of land into trust for the benefit of Indian tribes, totaling approximately 9,000 acres. *Internal BIA Memo*, October 11, 2002. Under the court of appeals'

decision, any number of criminal enterprises could conceal themselves on this, and all other tribal land.[1]

Finally, the court of appeals' decision would also allow the Tribe to recover damages against county officers for the asserted violation of its sovereign immunity under 42 U.S.C. § 1983 ("§ 1983"). However, the notion that a tribe is a "person" within the meaning of § 1983 defies the statute's plain language, legislative history and purposes. This aspect of the ruling below heightens the decision's restraint upon the provision of law enforcement services within Indian country. The court of appeals' decision effects an ill-conceived and unwarranted extension of the concept of tribal sovereign immunity and erroneously grants to the Tribe previously unrecognized authority to bar the prosecution of an otherwise legitimate criminal investigation and to hold law enforcement officers personally liable for any abridgement of that purported authority. For these reasons, the *Amici* States respectfully request that review be granted.

SUMMARY OF ARGUMENT

Amici States believe that the issues presented in this case were resolved by this Court's decision last year in

[1] Because the court of appeals identified the Tribe's *sovereign immunity* as the source of its power to bar the execution of a search warrant, there may be no geographic limitations to a tribe's authority to evade state process. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (holding that tribes enjoy sovereign immunity with respect to governmental and commercial activities, whether they occur on or *off a reservation*).

Nevada v. Hicks. Apparently not, according to the Ninth Circuit Court of Appeals. The decision below turned Public Law 280 on its head and trumped this Court's *Hicks* analysis by limiting state jurisdiction to investigate *off-reservation* crimes. Yet Public Law 280, which extends state jurisdiction to *on-reservation* crimes, has no relevance whatsoever to crimes occurring off-reservation and so is not a basis for *limiting* the scope of state authority. In fact, states have "inherent" jurisdiction to execute search warrants, or any other form of process, within Indian country. *Nevada v. Hicks*, 533 U.S. at 366. No provision of federal law preempts the State of California's authority to do so. Nevertheless, the court of appeals concluded that, because the warrant was executed against the Tribe – rather than against an individual tribal member or non-member on tribal lands – state jurisdiction is categorically preempted absent tribal waiver or congressional authorization. *Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony v. Inyo County* (*Bishop Paiute*), Pet. App. 22a-23a. This ruling cannot be reconciled with *Hicks*.

The court of appeals also erred in its decision to attach personal liability to county law enforcement officials who conducted a search in a manner approved by this Court in *Hicks*. *Bishop Paiute*, Pet. App. 42a. Even assuming that this Court's *Hicks* decision is distinguishable from this case, and the execution of the search warrant violated the Tribe's sovereign immunity, the *Tribe* may not sue the county officers for a violation of its sovereign immunity under 42 U.S.C. § 1983. The plain language, legislative history, and the purposes of § 1983 all establish that a sovereign entity is not a "person" within the meaning of the statute and so has no standing to assert rights under it.

Not only is the decision below incorrect on the law, but it places county law enforcement officers charged with the execution of warrants in Indian country in an untenable position. Unable to distinguish with certainty between tribal facilities immune to search and non-tribal facilities subject to search, law enforcement officers will forego conducting investigations in Indian country to avoid the potential of personal liability under § 1983. As a result, citizens everywhere face a substantial likelihood that they will be denied effective law enforcement whenever an investigation leads to Indian country.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A TRIBE'S SOVEREIGN IMMUNITY BARS THE EXECUTION OF A SEARCH WARRANT, ISSUED ON PROBABLE CAUSE, FOR THE SEIZURE OF TRIBAL PROPERTY, BY COUNTY LAW-ENFORCEMENT OFFICERS INVESTIGATING OFF-RESERVATION CRIMINAL ACTIVITY

This Court's decision in *Hicks* should have been dispositive of the issues presented to the court of appeals in this case. Yet the *Hicks* decision was ignored in the ruling. The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law-enforcement activity within Indian country – even that which relates to the commission of an off-reservation crime. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of Congress' intent to

abrogate tribal sovereign immunity under Public Law 280. But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime. Public Law 280 grants that "Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." 18 U.S.C. § 1162(a). *See also Hicks*, 533 U.S. at 366 (noting that PL-280 applies only to crimes committed in Indian country). Accordingly, this case has nothing whatsoever to do with attributes of tribal sovereignty Congress may have intended to preserve under Public Law 280 as a matter of statutory interpretation. Rather, this case concerns whether, and to what extent, state sovereignty is diminished by tribal sovereignty as a matter of constitutional law.

In *Nevada v. Hicks*, this Court concluded that neither a tribe's inherent sovereignty, nor its delegated authority, permits it to "regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Hicks*, 533 U.S. at 358. Under the *Hicks* analysis, the court of appeals' decision should have been rooted in the principles established by *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and *Montana v. United States*, 450 U.S. 544 (1981), that "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Hicks*, 533 U.S. at 359 (quoting *Montana v. United States*, 450

U.S. at 564, emphasis added in *Hicks*). Thus, under *Hicks* the proper approach presumes that the tribe has no civil authority to regulate the execution of a state search warrant, unless it is "necessary to protect tribal self-government or to control internal relations" or unless such jurisdiction has been conferred by Congress. *Hicks,* 533 U.S. at 360. In *Bishop Paiute*, however, the court of appeals expressly rejected this approach and in doing so adopted the "more categorical approach" found in this Court's jurisprudence controlling state efforts to *tax* Indian tribes, a line of authority that addresses other concerns. *Bishop Paiute*, Pet. App. 22a-23a.

In determining the powers that are necessary for a tribe to protect self-government and control internal relations, the *Hicks* decision considered the tribal powers referred to in *Montana*: "tribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'" *Hicks*, 533 U.S. at 360-61 (quoting *Strate v. A-1 Construction*, 520 U.S. 438, 459 (1997)). On the other hand, this Court acknowledged that its decisions make clear that Indian tribes' right "to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Hicks,* 533 U.S. at 362. To the contrary, generally an Indian reservation is considered part of the territory of the state and so "state sovereignty does not end at a reservation's border." *Id.* at 361-62 (stating that the Court long ago departed from the platonic notions of tribal sovereignty articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). And when "state interests outside the reservation are implicated, States may regulate the activities even of tribe

members on tribal land . . . ." *Hicks*, 533 U.S. at 362. In *Hicks* this Court concluded that the power to regulate state officers in the execution of process related to the off-reservation violation of state law is not essential to tribal self-government or internal relations, but that such state jurisdiction over reservations is "inherent," and carries with it authority for state officers to execute process on tribal lands. *Id.* at 363-65. "The State's interest in executing process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs State government." *Id.* at 364.

II. CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A TRIBE MAY SUE UNDER 42 U.S.C. § 1983 TO REMEDY AN ALLEGED VIOLATION OF SOVEREIGN IMMUNITY BY COUNTY LAW ENFORCEMENT OFFICERS

In this case, the Bishop Paiute Tribe seeks redress in its capacity as a domestic dependent sovereign, a status that is incompatible with "personhood" within the meaning of 42 U.S.C. § 1983. Because only a "person" may sue under the statute, the Tribe has no standing to maintain this claim.[2] A tribe is not a "person" within the meaning of

[2] The Tribe's standing under § 1983 has not been raised in the courts below. Nevertheless, the Court is obliged to examine standing *sua sponte* where standing has erroneously been assumed below. (*See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (" '[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no

(Continued on following page)

§ 1983 when it seeks a remedy for a violation of its sovereign powers. Congress' original purpose in enacting § 1983 was "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961). The purposes of the Fourteenth Amendment were first explained by the United States Supreme Court in *The Slaughter-House Cases*, in which the Court ruled that the Equal Protection Clause of the Fourteenth Amendment was never intended to protect business or contractual interests from an exercise of a state's police powers. *The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872). This decision was rooted in the understanding that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Fourteenth Amendment], and by it such laws are forbidden." *Id.* at 81. Section 1983 was expressly authorized in the final section of the Fourteenth Amendment, U.S. Const., amend. XIV, § 5, and was intended to provide a remedy when states failed to conform their laws to the Fourteenth Amendment's requirements. *Id.* at 81. Even though § 1983 has, since *The Slaughter-House Cases*, been used to remedy a broad range of *individual* rights violations, there is no precedent, other than this case, for § 1983 being recognized as a remedy for a perceived violation of an attribute of sovereignty.

contention concerning it.' " (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936))).

Section 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity . . . ." 42 U.S.C. § 1983. It is established beyond any doubt that under § 1983, a sovereign or a governmental entity is not subject to suit as a "person" within the meaning of the statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989) (*Will*) (stating that neither states nor state officials acting in their official capacity are "persons" *subject* to suit under § 1983). There is no reason to believe that the term "person" was intended by Congress to have two different meanings within the same sentence of § 1983. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 597 (1995) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."). Accordingly, if "person" within the meaning of § 1983 may not include a governmental entity for the purpose of being subjected to suit, it may not include a governmental entity for the purpose of bringing suit either.

Although this Court's leading precedent establishing that a state is not a "person" within the meaning of § 1983 related to the State of Michigan's status as a defendant, the decision's discussion of concepts of sovereignty is just as applicable to Indian tribes and to the concept of tribal sovereignty. *See Will*, 491 U.S. at 71. This Court noted that in common usage the term "person" does not include a sovereign, and statutes employing the word "person" are

ordinarily construed to exclude sovereigns. *Id.* at 64. In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), the Court's review of § 1983's legislative history led it to determine that the Territory of Guam is not a "person" within the meaning of the statute. The Court found that Congress was concerned with enforcing the provisions of the Fourteenth Amendment and in particular was concerned about the insecurity of life and property in the South during the Era of Reconstruction. *Id.* at 187-88. "[T]he remedy provided by § 1983 was designed to combat the perceived evil . . . . ('Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.'" *Id.* at 189 (quoting *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973)). The Court in *Ngiraingas* also relied upon the Dictionary Act, which originally defined "person" to include the phrase "bodies politic and corporate." However, the Act's amendment in 1874 omitted those three words and substituted "partnerships and corporations," eliminating any confusion that the word "person" may be generally understood to include sovereign political entities. *Id.* at 190-91; *see also Will*, 491 U.S. at 69 ("[W]e disagree with Justice BRENNAN that at the time the Dictionary Act was passed 'the phrase "bodies politic and corporate" was understood to include the States.' . . . Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States . . . . (In our view, the Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable.").

The text, legislative history and purposes of § 1983 establish that Congress excluded sovereignties from the

definition of "person." The Ninth Circuit's conclusion that the Tribe is a person that may remedy the county officers' purportedly extra-jurisdictional search under § 1983 is error, and should be reversed by this Court.

CONCLUSION

For all the reasons stated above, the *Amici* States urge the Court to grant the petition for certiorari.

Respectfully submitted,

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No. 02-281

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2002

INYO COUNTY, A PUBLIC ENTITY; PHILLIP McDOWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF INYO COUNTY; AND DANIEL LUCAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE COUNTY OF INYO,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF INYO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

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No. 02-281

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AMICUS CURIAE BRIEF IN SUPPORT OF INYO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing as the authorized law officer of the county, and on behalf of the California District Attorneys Association and the California State Association of Counties, pursuant to Supreme Court Rule 37, subdivisions 3(a) and 4.[1]

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1. Los Angeles County Charter section 25 (1995) states:
"Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board or Commission." It is provided in the California general (continued...)

INTEREST OF AMICUS CURIAE

There are 107 federally recognized Indian tribes and 95 Federal Indian reservations in the state of California with about 40 more Indian groups seeking to gain federal recognition. In 2000, according to the U.S census there are 220,657 American Indians living in California.[2]

The District Attorney of Los Angeles County, his fellow fifty-seven (57) other elected district attorneys in this state, as well as the fifty-eight (58) counties represented by the California State Association of Counties are very concerned with Ninth Circuit's decision in this case. There are now numerous Indian casinos on Indian territories within the state of California. Each of these casinos already represent potential serious trouble spots for law enforcement officers throughout the state. If the law as set forth in this
decision is allowed to remain, all persons who use and patronize these casinos will be at risk because trained law enforcement authorities are in effect persona non grata, and worse yet, sheriffs

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1. (...continued)
law that:"The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses." Cal. Government Code, section 26500 (West 1988).

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state.

The California District Attorneys Association is a California prosecutorial organization counting among its 2400 members, all of the 58 elected District Attorneys in California. CDAA's Appellate Committee takes a proactive stance on matters of statewide concern to prosecutors.

Copies of the consent letters have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.2(a).

2. San Diego State University, *California Indians* (visited Oct.15, 2002) <http://infodome.sdsu.edu/research/guides/calindians/calind.shtml>

and district attorneys who venture into Indian enclaves to enforce the law will be subject to debilitating civil lawsuits.

The decision by the Ninth Circuit, if not reversed by this Court, could result in the growing number of tribal casinos in California becoming completely isolated from any state and county law enforcement efforts or processes. We are all aware of the rapid mobility automobiles have provided to criminals. Counties with Indian casinos have an urgent need to protect the neighborhoods adjacent to the reservations and the Indians. Even the counties in California without Indian Casinos have a strong interest in preventing fugitive flight to neighboring counties with tribal casinos. If criminals can conceal themselves, evidence, and proceeds of crimes in casinos without any fear of disclosure, this will have a substantial negative effect on the criminal justice system for Indians and non-Indians alike. The decision by the Ninth Circuit has effectively established the foundation of extra-judicial enclaves within one hour driving distances of immense urban areas, including San Francisco, Los Angeles and San Diego. Los Angeles County is within an easy two hour driving radius of many Indian casinos in Riverside, San Bernardino and San Diego counties. There are also Indian groups in Los Angeles County such as the Gabrielino/Tongva Tribal Council in Covina seeking Federal recognition. It is foreseeable that future Indian casinos could be established within twenty-five minutes driving time from downtown Los Angeles. All Indian casinos seek to attract non-Indian customers, customers who are largely unaware that they are entering an enclave isolated from any state and county law enforcement protection.

If property owned by tribal governments is immune from lawful execution of search warrants or subpoenas, the potential impact on law enforcement throughout the state, not just in Indian country, could be substantial. If law enforcement authorities are required to enforce state laws in Indian country, they cannot be made to relinquish the necessary tools for enforcement. To do so would be to render the justice system a hollow illusion in Indian country. Stolen money could be laundered, evidence could be hidden, and fugitives could become immune from lawful process. The vacuum created by the absence of law enforcement creates an environment where predators may flourish. The resulting problems could not

be hermetically sealed from the neighboring communities even with a perimeter wall and a Brandenburg gate. The real potential for chaos is not mere speculation. In 1995 Lake county in California was thrust into turmoil as nearly seventy people fled the Elem Indian Colony when gun battles erupted over disputed casino profits. Nine people were wounded, five Indian houses were torched and other houses were boarded up as a shield against gunfire. Numerous arrests were made. Peace was not restored to the one hundred member reservation until sheriff's deputies entered the reservation to restore order. The Elem Indian Colony is only ninety miles from San Francisco.[3] Even potential terrorist activity would be immune. Federal authority over state crime has been completely consigned to the states in Public Law 280 states. The protection sought by the tribal leaders against unreasonable searches and abuse of process is equally available to all Americans but requires that Indian tribes, like everyone else, submit to the law of the land.

Amicus, through this brief has focused on the this limited issue, with the hope of providing assistance to the Court.

SUMMARY OF ARGUMENT

When Congress passed Public Law 280 in 1953, it consigned authority to enforce criminal law in Indian Country to six states including California. As one of the fifty states, California has an inherent right to prosecute crimes in California outside Indian Country. The Ninth Circuit in their decision on this case seemingly recognized this legislation but then decided that the six states are to be denied the tools necessary to enforce the law. In doing so, it disregarded common sense and the opinion of this Court in *Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

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3. Kathleen Sullivan, *Pomo Indian truce shaky, as factions return*, SAN FRANCISCO EXAMINER, October 25,1995, 1995 at A-11.

A Year After Violence, Reservation Looks to Heal with Election, Associated Press, Nov. 29, 1996, available in LEXIS, Nexis Library, US News Combined File.

Since the state has the authority and duty to prosecute crimes in Indian Country, the authority for the preliminary procedures in support of that process is necessarily mandated. This is already established for crimes outside the reservation. To hold otherwise would be to render the duty to prosecute crimes in Indian Country an empty shell. These enclaves would permit evidence of all crimes, both on and off the reservation, to be concealed. Perpetuating the reasoning of this Ninth Circuit decision will expose the Indian residents of California reservations to increased danger from violent crime as the chilling effect upon law enforcement grows. If law enforcement officers are loathe to execute search warrants on tribal property due to fear of liability, they will be also reluctant to arrest and investigate crimes. The theoretical ability to prosecute criminals who commit robbery at a casino is meaningless without the power to subpoena the victim clerk or issue a subpoena duces tecum for relevant records in an embezzlement case. Ironically, this application of the concept of sovereignty leaves the supposed beneficiaries of this doctrine, the Indians, most vulnerable to violence and exploitation. If an Indian man beats his wife in a casino parking lot monitored by video cameras, and she is rendered comatose by the beating, the only evidence, the video tape, available to prosecute this man would be denied to the responsible authorities. If an Indian was being falsely accused of the same type of offense, the only exculpatory evidence could also be withheld by the tribe claiming sovereignty.

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ARGUMENT

I. PUBLIC LAW 280 CONFERRED AUTHORITY UPON CALIFORNIA TO PROSECUTE FELONIES OCCURRING IN INDIAN COUNTRY OR INVOLVING INDIAN DEFENDANTS OR VICTIMS

A. Sovereignty Of Indian Tribes Is Subject To The Powers Of Congress And May Be Limited By Congress

The sovereignty of Indian tribes is subject to the broad powers of Congress to regulate.[4] The Supreme Court has recognized that this power is plenary and that Congress has exclusive authority over Indians and tribal property.[5] This authority can be delegated to the states and was so in 1953 when Congress passed Public Law 280. Crimes and Criminal Procedure 18 U.S.C., § 1162; *Robinson v. Wolff*, 349 F.Supp. 514 (D.C. Neb. 1972), aff'd., 468 F.2d 438 (8th Cir. Neb. 1972). This act granted six states, including California, criminal jurisdiction over persons who commit crimes or who are victims of crimes in Indian country. Title 18 U.S.C., § 1162 (2001), provides in pertinent part:

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4. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (ruling that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess"); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (basing plenary power on treaty history with Indians and their guardianship status with the United States); *Winton v. Amos*, 255 U.S. 373, 391 (1921) (asserting that Congress has plenary power to legislate issues of tribal property because of the dependent relationship the Indians have with the U.S. Government); see also *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (asserting that tribal sovereignty is subject to the "supreme legislative authority of the United States").

5. See Laurence M. Hauptman, Congress, Plenary Power, and the American Indian, 1870 to 1992, in Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution, 317, 318 (Oren R. Lyons et al. eds., 1992) (defining the doctrine as that which allows Congress "to unilaterally intervene and legislate over a wide range of Indian affairs, including the territory of Indian Nations").

> State jurisdiction over offenses committed by or against Indians in the Indian country
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory *to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:* . . . Alaska, Minnesota, Nebraska. Oregon, Wisconsin and California.

(Italics added.)

When Congress enacted Public Law 280, nothing more was required from the six named states to assume jurisdiction over crimes committed in Indian country. 18 U.S.C.A., § 1162; see *People v. Miranda,* 106 Cal.App.3d 504, 506 (1980) [no state legislation necessary to assume jurisdiction under Public Law 280 since states already had either concurrent or residual jurisdiction over offenses committed on Indian lands within their territory]; cf. *Anderson v. Gladden*, 293 F.2d 463, 467-468 (9th Cir. 1961), *cert. den.*, 368 U.S. 949 (1961) [no affirmative action required by Oregon to assume jurisdiction in Indian country even where there was a prior treaty between the tribe and the Federal government providing for Federal prosecution]. At the same time, Congress consigned the authority to prosecute crimes in Indian country to the six states pursuant to part (c) of 18 U.S.C., § 1162:

> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Prior to 1953, Congress had enacted two statutes which established Federal authority to prosecute crimes in Indian Country. These statutes are known as the General Crimes Act and the Major

Crimes Act[6]. The Major Crimes Act delineates state and federal Jurisdiction in states other than the six designated in Public Law 280 (which includes California). Public Law 280 explicitly withdrew federal law enforcement from those six states, relegating to the states exclusive jurisdiction over crimes committed in Indian country.

This Court recently addressed this issue in *Nevada v. Hicks*, 533 U.S. 353. In that case, the tribal court attempted to exercise jurisdiction through a Federal tort action against state officials who served a search warrant on tribal land. In denying the tribal court jurisdiction, the Court discussed the sovereignty issue.

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Peters 515, 561 (1832)," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 82 S. Ct. 562 (1962)

Id. at 361-362, fn. omitted.

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6. The General Crimes Act (18 U.S.C. § 1152), enacted in 1817, generally provided for Federal prosecution of interracial crimes in Indian country, but precluded Federal prosecution where an Indian was already being prosecuted under tribal law.

The Major Crimes Act (18 U.S.C. § 1153) was enacted in 1885 and provided for Federal concurrent jurisdiction over Indians for enumerated crimes. This statutory structure allowed for either tribal prosecution or Federal prosecution, or both. (*United States v. Wheeler* 435 U.S. 313, 325, 98 S.Ct. 1079, 55 L.Ed.2d 302 (1978).)

B. California Has Jurisdiction And The Duty To Prosecute Welfare Fraud Committed On Or Outside Indian Land Within The State Of California

Since the passage of Public Law 280, there has been some litigation as to what acts fall under State jurisdiction and what acts are subject to regulation by tribal authorities. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the Court ruled that an attempt by Riverside County to enforce California Penal Code provisions regulating poker and bingo inside reservation boundaries was an unauthorized extension of state civil regulatory power not granted under Public Law 280. In so holding, the Court declared that when a state tries to enforce one of its laws in Indian country, it must first determine if the law is, by nature, civil/regulatory or criminal/prohibitory. *Id.* at 208. In *Cabazon*, the law was found to be merely civil/regulatory and therefore unenforceable by state authorities on the reservation. In determining whether the specific law was civil/regulatory or criminal/prohibitory, the Court sought to determine if the specific conduct was a subset of other permitted conduct or whether it was prohibited throughout the state. In *Cabazon*, the Court determined that since bingo is an authorized activity by charitable organizations and gambling is permitted at horse race tracks and through the state lottery, these specific violations were civil/regulatory rather than criminal/prohibitory. *Id.* at 210-211.

In this case involving the Bishop Paiute Tribe, the specific state law sought to be enforced is California Welfare & Institutions Code, section 10980, subdivision (c).[7] This section provides for

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7. Section 10980 provides:

> (a) Any person who, willfully and knowingly, with the intent to deceive, makes a false statement or representation or knowingly fails to disclose a material fact in order to obtain aid under the provisions of this division or who, knowing he or she is not entitled thereto, attempts to obtain aid or to continue to receive aid to which he or she is not entitled, or to receive a larger amount than that to which he or she is legally entitled, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period of not more than six months,by a fine of not more than five

(continued...)

potential state prison sentences where fraud and deceit are employed in the unlawful collecting of welfare. Misconduct involving forgery or fraud "inherently involves dishonesty and readiness to lie, and thus involves moral turpitude." *People v. Flanagan*, 185 Cal.App.3d 764, 771 (Cal.App. 5th Dist. 1986). In none of the cases interpreting *Cabazon* has a crime involving moral turpitude been defined as merely regulatory and beyond the states' purview of enforcement. When the crime requires fraud or deceit, as does welfare fraud, there is no doubt it is criminal/prohibitory and subject to state jurisdiction.

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7. (...continued)

hundred dollars ($ 500), or by both imprisonment and fine.

(b) Any person who knowingly makes more than one application for aid under the provisions of this division with the intent of establishing multiple entitlements for any person for the same period or who makes an application for that aid for a fictitious or nonexistent person or by claiming a false identity for any person is guilty of a felony, punishable by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, or by a fine of not more than one thousand dollars ($ 1,000), or by both imprisonment and fine.

(c) Whenever any person has, by means of false statement or representation or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:

(1) If the total amount of the aid obtained or retained is four hundred dollars ($ 400) or less, by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($ 500), or by both imprisonment and fine.

(2) If the total amount of the aid obtained or retained is more than four hundred dollars ($ 400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($ 5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars ($ 1,000), or by both imprisonment and fine.

II. THE AUTHORITY TO PROSECUTE INCLUDES THE AUTHORITY TO CONDUCT INVESTIGATIONS AND PREPARE FOR PROSECUTION

The authority to prosecute criminal laws in Indian country required in Public Law 280 must necessarily include the authority to investigate and utilize the search warrant to effectively litigate a case. As discussed by the district court in *Sycuan Band of Mission Indians v. County of San Diego, et al.*, 788 F.Supp. 1498 (S.D.Cal. 1992), aff'd, 38 F.3d 402 (9th Cir.Cal 1994), this authority was affirmed by comparing the alternative scenario where there was no authority to issue a search warrant. In *Sycuan*, the state was seeking to prosecute the possession of gaming machines. Since this was determined to be a civil/regulatory class of offenses and *not* subject to state prosecution,[8] logically there was no authority to issue a search warrant where the state lacked the authority to prosecute any charges based on evidence resulting from that warrant. The district court stated, "[a] state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation." *Id.* at 1507. To hold otherwise would render the authority to prosecute crimes in Indian country meaningless if the traditional tools for prosecutors were left at the gates to Indian country. As an example, a robbery committed against an Indian casino employee inside the casino could not be prosecuted if the prosecutor is unable to subpoena the victim casino employee. Likewise, embezzlement committed against a tribe's casino could not be prosecuted if a prosecutor cannot issue a subpoena duces tecum for casino records for use in the prosecution of an embezzler. If there is located inside a casino, which is owned by the tribe, exculpatory or inculpatory evidence in a case where the state has the authority to prosecute, the casino and its owner/employees are subject to the same laws as the rest of the state. But, they also enjoy the same Constitutional protections. A murder suspect who flees to an Indian casino cannot expect sanctuary or that evidence of his crime will find a safe repository, but he can expect a lawful arrest. To permit casinos to become enclaves immune from the execution of

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8. Subject only to federal regulation.

lawful search warrants will result in condemning Indian casinos to inordinate pressure from organized crime to conceal evidence and proceeds from criminal activities.

The District Court in the *Sycuan* case went further and added overly expansive dicta suggesting that a sheriff exceeds his jurisdiction by serving a warrant on tribal land inside his county. *Sycuan Band of Mission Indians v. County of San Diego, et al.*, 788 F.Supp. at 1508. The District Court was incorrect in that assessment. California magistrates have the authority to issue search warrants to peace officers in their counties to search anywhere in the state. *People v. Fleming*, 29 Cal.3d 698, 703-707 (1981). A sheriff enforcing criminal/prohibitory laws pursuant to state law is executing authority granted to the states by Public Law 280. If he is attempting to enforce civil/regulatory laws, the sheriff could be acting outside that authority. To hold otherwise would result in depriving all people in Indian country in the six Public Law 280 states of any protection under the states' criminal justice system.

The authority of the state to execute search warrants in Indian country was clearly explained in the majority opinion in *Nevada v. Hicks, supra*, 533 U.S. 353. The Court stated that the process of state courts may extend to an Indian reservation where there is subject-matter or controversy within their cognizance. The Court went on to explain:

> The Court's references to "process" . . . , and the Court's concern . . . over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us. ("Process" is defined as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property," Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085.) This makes perfect sense, since, as we explained in the context of federal enclaves, *the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice."* [Citation.]

Id. at 363-364, italics added.

This Court applies the same Constitutional protections all Americans enjoy to those living in Indian country in California. The Court forcefully stated this position:

> We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control. . . . Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal-and state-law rights.

Nevada v. Hicks, 533 U.S. at 373.

To hold otherwise, would serve as a clarion call to all criminals, announcing a judicial vacuum and inviting potential anarchy, since the state would lose the necessary tools to prosecute serious felonies and the Federal government now lacks the authority to do so, having consigned it to the states.

While addressing the issue of qualified immunity as to the officers serving the search warrant, the Ninth Circuit included a dismissive footnote suggesting that the authority of the states to execute search warrants had already been clearly decided against local law enforcement. In footnote 5 of their opinion, they cited two cases which did not involve Public Law 280 states.[9] Both of

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9. Footnote 5 states" The Tenth Circuit has also addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), state authorities executed a search warrant on a tribal reservation. The Tenth Circuit concluded that the search warrant was invalid, and therefore the evidence should have been suppressed, because the state had no jurisdiction over the reservation to enforce its laws – including the execution of a search warrant – unless Congress consented to the state's jurisdiction. *Id.* at 1147. See also *Ross v. Neff*, 905 F.2d 1349, 1354-55 (10th Cir. 1990) (holding that the arrest of an Indian on Indian

(continued...)

those cases involve states which are not Public Law 280 states and one of those cases clearly distinguishes itself from any case arising in California.

> Congress has *granted general criminal jurisdiction to some states over Indian country within their borders*, see, e.g., 18 U.S.C. §§ 1162 (various states), 3243 (Kansas), but no such provision has been made for Oklahoma.

Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. Okla. 1990), italics added.

As shown in *Ross*, Oklahoma is a state which has not been granted criminal jurisdiction under the Major Crimes Act. This is a distinct situation from the one found in California where there is no federal jurisdiction to prosecute crimes; the duty to prosecute crimes was expressly delegated to California and five other states.

The Ninth Circuit also seemingly acknowledged the duty of the county district attorney to prosecute but presumed to dictate to law enforcement alternatives to a search warrant in prosecuting welfare fraud. These included serving a search warrant on the offenders in the hope that each offender kept accurate pay stubs or seeking consensual disclosure from the tribes of the offenders. These suggestions encroach on the separation of powers doctrine and demonstrate a woeful lack of experience in the gathering of admissible evidence necessary to prove a criminal case beyond a reasonable doubt. The pay stubs would need to be authenticated with business records and testimony of a custodian of records obtained from the tribe. Further, the authority cited for this approach, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* (1991), 498 U.S. 505, 514, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) is a civil case where the tribe was being sued

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9. (...continued)
land was illegal because the state had no jurisdiction over the reservation to enforce its laws -- including the execution of a search warrant -- unless Congress consented to the state's jurisdiction)." *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 911, fn. 5 (9th Cir.Cal. 2002).

civilly for payment of taxes. Once again, the Ninth Circuit attempted to use a case from a state which is not required to prosecute major felonies involving Tribal lands. It is not in any way analogous to a situation where a state is required to prosecute crimes but is deprived of a necessary tool to accomplish this goal.

CONCLUSION

The clear intent of Congress is to combat lawlessness in Indian country. Since California is required to assume the responsibility of protecting all persons against crimes in Indian country as it does for the rest of the state, the effective tools of law enforcement cannot be discarded. The Ninth Circuit Court's decision should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 23 2003
OFFICE OF THE CLERK

(8)

No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 19, 2002
PETITION FOR CERTIORARI GRANTED DECEMBER 2, 2002

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The following opinions, decisions, judgments and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

1. Court of Appeals - Original Opinion, filed January 4, 2002 . . . . . Pet. App. 9a-43a

2. Court of Appeals - Order Amending Opinion and Denying Petition for Rehearing En Banc, filed May 20, 2002 . . . . . Pet. App. 1a-8a

RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: 00-CV-6153

1	8/4/00	COMPLAINT for declaratory relief; injunctive relief;
4	9/6/00	MOTION to dismiss for failure to state a claim upon which relief can be granted by defendant Inyo County, defendant Phillip McDowell, Daniel Lucas motion TO BE HEARD by Senior Judge Robert E. Coyle ; Motion Hearing Set For 10/30/00 at 1:30 (sr) [Entry date 09/07/00]
12	11/22/00	ORDER by Senior Judge Coyle ORDERING motion to dismiss for failure to state a claim upon which relief can be granted by dfts [4] GRANTED CASE DISMISSED dfts' motion to dismiss granted (cc: all counsel) (hm) [Entry date 11/27/00]
13	11/27/00	JUDGMENT by Senior Judge Coyle; IT IS HEREBY ORDERED AND ADJUDGED that JUDGMENT IS ENTERED for dfts and against plas re motion to dismiss by dfts [4] GRANTED case TERMINATED (cc: all counsel) (hm) [Entry date 11/27/00]
15	12/22/00	NOTICE OF APPEAL by plaintiffs Bishop Paiute Tribe and Bishop Paiute Gaming from District Court decision re

judgment [13-2], re order [12-2] (fee status paid) (ls) [Entry date 12/26/00]

USCA9 Docket Sheet for 01-15007

1/3/01 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS is past due; CADS must be filed no later than for Ralph R. LePera; appellant's designation of RT is due 1/2/01, ; appellee's designation of RT is due 1/11/01,, ; appellant shall order transcript by 1/22/01, ; court reporter shall file transcript in DC by 2/21/01, ; certificate of record shall be filed by 2/28/01 ; appellant's opening brief is due 4/9/01, ; appellees' brief is due 5/9/01,, ; appellants' reply brief is due 5/23/01. [01-15007] (gar)

10/9/01 ARGUED AND SUBMITTED TO Harry PREGERSON, Johnnie B. RAWLINSON, Charles R. Weiner [01-15007] (pi)

1/4/02 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Unsigned, Published. Harry

PREGERSON, author; Johnnie B. RAWLINSON; Charles R. Weiner.) FILED AND ENTERED JUDGMENT. [01-15007] (kkw)

1/16/02 Filed motion and deputy clerk order: (Deputy Clerk: kkw) The mtn of aples for extension of time to file petition for rehearing and hearing en banc is granted. The due date is extended to 1/25/02. (Motion recvd 1/16/02) [01-15007] (kkw)

1/25/02 [4348173] Filed original and 50 copies Appellees petition for rehearing with suggestion for rehearing en 20 p.pages, served on 1/24/02 PANEL AND ACTIVE JUDGES [01-15007] (kkw)

5/20/02 Filed order (Harry PREGERSON, Johnnie B. RAWLINSON, Charles R. Weiner,):, The opinion filed 1/4/02 is amended (see TEXT)...The petition for rehearing and the suggestion for rehearing en banc are denied. [01-15007] (kkw)

TRIBAL-STATE COMPACT
BETWEEN THE STATE OF CALIFORNIA
AND THE BISHOP PAIUTE TRIBE

Executed December 9, 1999
by Governor Davis of California

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MISCELLANEOUS

ATTACHMENTS:
ADDENDUM A
ADDENDUM B
NOTICE OF ADOPTION OF MODEL TRIBAL LABOR RELATIONS ORDINANCE
MODEL TRIBAL LABOR RELATIONS ORDINANCE

TRIBAL-STATE GAMING COMPACT
Between the BISHOP PAIUTE TRIBE,
a federally recognized Indian Tribe,
and the
STATE OF CALIFORNIA

This Tribal-State Gaming Compact is entered into on a government-to-government basis by and between the Bishop Paiute Tribe AKA Paiute-Shosone Indians of the Bishop Community of the Bishop Conony, a federally-recognized sovereign Indian tribe (hereafter "Tribe"), and the State of California, a sovereign State of the United States (hereafter "State"), pursuant to the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) (hereafter "IGRA"), and any successor statute or amendments.

PREAMBLE

A. In 1988, Congress enacted IGRA as the federal statute governing Indian gaming in the United States. The purposes of IGRA are to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; to provide a statutory basis for regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; to ensure that gaming is conducted fairly and honestly by both the operator and players; and to declare that the establishment of an independent federal regulatory authority for gaming on Indian lands, federal standards for gaming on Indian lands, and a National Indian Gaming Commission are necessary to meet congressional concerns.

B. The system of regulation of Indian gaming fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among the three sovereigns involved: the federal government, the state in which a tribe has land, and the tribe itself. IGRA makes Class III gaming activities lawful on the lands of federally-recognized Indian tribes only if such activities are: (1) authorized by a tribal ordinance, (2) located in a state that permits such gaming for any purpose by any person, organization or entity, and (3) conducted in conformity with a gaming compact entered into between the Indian tribe and the state and approved by the Secretary of the Interior.

C. The Tribe is currently operating a tribal gaming casino offering Class III gaming activities on its land. On September 1, 1999, the largest number of Gaming Devices operated by the Tribe was 273.

D. The State enters into this Compact out of respect for the sovereignty of the Tribe; in recognition of the historical fact that Indian gaming has become the single largest revenue-producing activity for Indian tribes in the United States; out of a desire to terminate pending "bad faith" litigation between the Tribe and the State; to initiate a new era of tribal-state cooperation in areas of mutual concern; out of a respect for the sentiment of the voters of California who, in approving Proposition 5, expressed their belief that the forms of gaming authorized herein should be allowed; and in anticipation of voter approval of SCA 11 as passed by the California legislature.

E. The exclusive rights that Indian tribes in California, including the Tribe, will enjoy under this Compact create a unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming referred to in Section 4.0 of this Compact on non-Indian lands in California. The parties are mindful that this unique environment is of great economic value to the Tribe and the fact that income from Gaming Devices represents a substantial portion of the tribes' gaming revenues. In consideration for the exclusive rights enjoyed by the tribes, and in further consideration for the State's willingness to enter into this Compact, the tribes have agreed to provide to the State, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices.

F. The State has a legitimate interest in promoting the purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or non-gaming. The State contends that it has an equally legitimate sovereign interest in regulating the growth of Class III gaming activities in California. The Tribe and the State share a joint sovereign interest in ensuring that tribal gaming activities are free from criminal and other undesirable elements.

Section 1.0. PURPOSES AND OBJECTIVES.

The terms of this Gaming Compact are designed and intended to:

(a) Evidence the goodwill and cooperation of the Tribe and State in fostering a mutually respectful government-to-

government relationship that will serve the mutual interests of the parties.

(b) Develop and implement a means of regulating Class III gaming, and only Class III gaming, on the Tribe's Indian lands to ensure its fair and honest operation in accordance with IGRA, and through that regulated Class III gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.

(c) Promote ethical practices in conjunction with that gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Tribe's Gaming Operation and protecting against the presence or participation of persons whose criminal backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming.

Sec. 2.0. DEFINITIONS.

Sec. 2.1. "Applicant" means an individual or entity that applies for a Tribal license or State certification.

Sec. 2.2. "Association" means an association of California tribal and state gaming regulators, the membership of which comprises up to two representatives from each tribal gaming agency of those tribes with whom the State has a gaming compact under IGRA, and up to two delegates each

from the state Division of Gambling Control and the state Gambling Control Commission.

Sec. 2.3. "Class III gaming" means the forms of Class III gaming defined as such in 25 U.S.C. Sec. 2703(8) and by regulations of the National Indian Gaming Commission.

Sec. 2.4. "Gaming Activities" means the Class III gaming activities authorized under this Gaming Compact.

Sec. 2.5. "Gaming Compact" or "Compact" means this compact.

Sec.2.6."Gaming Device" means a slot machine, including an electronic, electromechanical, electrical, or video device that, for consideration, permits: individual play with or against that device or the participation in any electronic, electromechanical, electrical, or video system to which that device is connected; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the application of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith.

Sec. 2.7. "Gaming Employee" means any person who (a) operates, maintains, repairs, assists in any Class III gaming activity, or is in any way responsible for supervising such gaming activities or persons who conduct, operate, account for, or supervise any such gaming activity, (b) is in

a category under federal or tribal gaming law requiring licensing, (c) is an employee of the Tribal Gaming Agency with access to confidential information, or (d) is a person whose employment duties require or authorize access to areas of the Gaming Facility that are not open to the public.

Sec. 2.8. "Gaming Facility" or "Facility" means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained (but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) therein.

Sec. 2.9. "Gaming Operation" means the business enterprise that offers and operates Class III Gaming Activities, whether exclusively or otherwise.

Sec. 2.10. "Gaming Ordinance" means a tribal ordinance or resolution duly authorizing the conduct of Class III Gaming Activities on the Tribe's Indian lands and approved under IGRA.

Sec. 2.11. "Gaming Resources" means any goods or services provided or used in connection with Class III Gaming Activities, whether exclusively or otherwise, including, but not limited to, equipment, furniture, gambling devices and ancillary equipment, implements of gaming activities such as playing cards and dice, furniture designed primarily for Class

III gaming activities, maintenance or security equipment and services, and Class III gaming consulting services. "Gaming Resources" does not include professional accounting and legal services.

Sec. 2.12. "Gaming Resource Supplier" means any person or entity who, directly or indirectly, manufactures, distributes, supplies, vends, leases, or otherwise purveys Gaming Resources to the Gaming Operation or Gaming Facility, provided that the Tribal Gaming Agency may exclude a purveyor of equipment or furniture that is not specifically designed for, and is distributed generally for use other than in connection with, Gaming Activities, if the purveyor is not otherwise a Gaming Resource Supplier as described by of Section 6.4.5, the compensation received by the purveyor is not grossly disproportionate to the value of the goods or services provided, and the purveyor is not otherwise a person who exercises a significant influence over the Gambling Operation.

Sec. 2.13. "IGRA" means the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) any amendments thereto, and all regulations promulgated thereunder.

Sec. 2.14. "Management Contractor" means any Gaming Resource Supplier with whom the Tribe has contracted for the management of any Gaming Activity or Gaming Facility, including, but not limited to, any person who would be regarded as a management contractor under IGRA.

Sec. 2.15. "Net Win" means "net win" as defined by American Institute of Certified Public Accountants.

Sec. 2.16. "NIGC" means the National Indian Gaming Commission.

Sec. 2.17. "State" means the State of California or an authorized official or agency thereof.

Sec. 2.18. "State Gaming Agency" means the entities authorized to investigate, approve, and regulate gaming licenses pursuant to the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code).

Sec. 2.19. "Tribal Chairperson" means the person duly elected or selected under the Tribe's organic documents, customs, or traditions to serve as the primary spokesperson for the Tribe.

Sec. 2.20. "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance. No person employed in, or in connection with, the management, supervision, or conduct of any gaming activity may be a member or employee of the Tribal Gaming Agency.

Sec. 2.21. "Tribe" means the Bishop Paiute Tribe, a federally-recognized Indian tribe, or an authorized official or agency thereof.

Sec. 3.0 CLASS III GAMING AUTHORIZED AND PERMITTED. The Tribe is hereby authorized and permitted to engage in only the Class III Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class III gaming that is not expressly authorized in that Section.

Sec. 4.0. SCOPE OF CLASS III GAMING.

Sec. 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:

(a) The operation of Gaming Devices.

(b) Any banking or percentage card game.

(c) The operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law.

(e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

Sec. 4.2. Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

Sec. 4.3. Authorized number of Gaming Devices

Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:

(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices.

Sec. 4.3.2. Revenue Sharing with Non-Gaming Tribes.

(a) For the purposes of this Section 4.3.2 and Section 5.0, the following definitions apply:

(i) A "Compact Tribe" is a tribe having a compact with the State that authorizes the Gaming Activities authorized by this Compact. Federally-recognized tribes that are operating fewer than 350 Gaming Devices are "Non-Compact Tribes." Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all

material respects. A Compact Tribe that becomes a Non-Compact Tribe may not thereafter return to the status of a Compact Tribe for a period of two years becoming a Non-Compact Tribe.

(ii) The Revenue Sharing Trust Fund is a fund created by the Legislature and administered by the California Gambling Control Commission, as Trustee, for the receipt, deposit, and distribution of monies paid pursuant to this Section 4.3.2.

(iii) The Special Distribution Fund is a fund created by the Legislature for the receipt, deposit, and distribution of monies paid pursuant to Section 5.0.

Sec. 4.3.2.1. Revenue Sharing Trust Fund.

(a) The Tribe agrees with all other Compact Tribes that are parties to compacts having this Section 4.3.2, that each Non-Compact Tribe in the State shall receive the sum of $1.1 million per year. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay $1.1 million per year to each Non-Compact Tribe, any available monies in that Fund shall be distributed to Non-Compact Tribes in equal shares. Monies in excess of the amount necessary to $1.1 million to each Non-Compact Tribe shall remain in the Revenue Sharing Trust Fund available for disbursement in future years.

(b) Payments made to Non-Compact Tribes shall be made quarterly and in equal shares out of the Revenue Sharing Trust Fund. The Commission shall serve as the

trustee of the fund. The Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes. In no event shall the State's General Fund be obligated to make up any shortfall or pay any unpaid claims.

Sec. 4.3.2.2. Allocation of Licenses.

(a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities:

(1). The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(2) The Tribe may acquire and maintain a license to operate a Gaming Device by paying into the Revenue Sharing Trust Fund, on a quarterly basis, in the following amounts:

Number of Licensed Devices	Fee Per Device Per Annum
1-350	$0
351-370	$900

751-1250	$1950
1251-2000	$4350

(3) Licenses to use Gaming Devices shall be awarded as follows:

(i) First, Compact Tribes with no Existing Devices (i.e., the number of Gaming Devices operated by a Compact Tribe as of September 1, 1999) may draw up to 150 licenses for a total of 500 Gaming Devices;

(ii) Next, Compact Tribes authorized under Section 4.3.1 to operate up to and including 500 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (i)), may draw up to an additional 500 licenses, to a total of 1000 Gaming Devices;

(iii) Next, Compact Tribes operating between 501 and 1000 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (ii)), shall be entitled to draw up to an additional 750 Gaming Devices;

(iv) Next, Compact Tribes authorized to operate up to and including 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iii)), shall be entitled to draw up to an additional 500 licenses, for a total authorization to operate up to 2000 gaming devices.

(v) Next, Compact Tribes authorized to operate more than 1500 gaming devices (including tribes, if any, that have

acquired licenses through subparagraph (iv))., shall be entitled to draw additional licenses up to a total authorization to operate up to 2000 gaming devices.

(vi). After the first round of draws, a second and subsequent round(s) shall be conducted utilizing the same order of priority as set forth above. Rounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs.

(e) As a condition of acquiring licenses to operate Gaming Devices, a non-refundable one-time pre-payment fee shall be required in the amount of $1,250 per Gaming Device being licensed, which fees shall be deposited in the Revenue Sharing Trust Fund. The license for any Gaming Device shall be canceled if the Gaming Device authorized by the license is not in commercial operation within twelve months of issuance of the license.

Sec. 4.3.2.3. The Tribe shall not conduct any Gaming Activity authorized by this Compact if the Tribe is more than two quarterly contributions in arrears in its license fee payments to the Revenue Sharing Trust Fund.

Sec. 4.3.3. If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Sections 4.3.1 and Section 4.3.2, and their subsections.

SEC. 5.0 REVENUE DISTRIBUTION

Sec. 5.1. (a) The Tribe shall make contributions to the Special Distribution Fund created by the Legislature, in accordance with the following schedule, but only with respect to the number of Gaming Devices operated by the Tribe on September 1, 1999:

Number of Terminals in Quarterly Device Base	Percent of Average Gaming Device Net Win
1-200	0%
201-500	7%
501-1000	7% applied to the excess over 200 terminals, up to 500 terminals, plus 10% applied to terminals over 500 terminals, up to 1000 terminals.
1000+	7% applied to excess over 200, up to 500 terminals, plus 10% applied to terminals over 500, up to 1000 terminals, plus 13% applied to the excess above 1000 terminals.

(b) The first transfer to the Special Distribution Fund of its share of the gaming revenue shall made at the conclusion of the first calendar quarter following the second anniversary date of the effective date of this Compact.

Sec. 5.2. Use of funds. The State's share of the Gaming Device revenue shall be placed in the Special Distribution Fund, available for appropriation by the Legislature for the following purposes: (a) grants, including any administrative costs, for programs designed to address gambling addiction; (b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the Compact; (d) payment of shortfalls that may occur in the Revenue Sharing Trust Fund; and (e) any other purposes specified by the Legislature. It is the intent of the parties that Compact Tribes will be consulted in the process of identifying purposes for grants made to local governments.

Sec. 5.3. (a) The quarterly contributions due under Section 5.1 shall be determined and made not later than the thirtieth (30th) day following the end of each calendar quarter by first determining the total number of all Gaming Devices operated by a Tribe during a given quarter ("Quarterly Device Base"). The "Average Device Net Win" is calculated by dividing the total Net Win from all terminals during the quarter by the Quarterly Terminal Base.

(b) Any quarterly contribution not paid on or before the date on which such amount is due shall be deemed overdue. If any quarterly contribution under Section 5.1 is overdue to the Special Distribution Fund, the Tribe shall pay to the Special Distribution Fund, in addition to the overdue quarterly contribution, interest on such amount from the date

the quarterly contribution was due until the date such quarterly contribution (together with interest thereon) was actually paid at the rate of 1.0% per month or the maximum rate permitted by state law, whichever is less. Entitlement to such interest shall be in addition to any other remedies the State may have.

(c) At the time each quarterly contribution is made, the Tribe shall submit to the State a report (the "Quarterly Contribution Report") certified by an authorized representative of the Tribe reflecting the Quarterly Device Base, the Net Win from all terminals in the Quarterly Device Base (broken down by Gaming Device), and the Average Device Net Win.

(d) If the State causes an audit to be made pursuant to subdivision (c), and the Average Device Net Win for any quarter as reflected on such quarter's Quarterly Contribution Reports is found to be understated, the State will promptly notify the Tribe, and the Tribe will either accept the difference or provide a reconciliation satisfactory to the State. If the Tribe accepts the difference or does not provide a reconciliation satisfactory to the State, the Tribe must immediately pay the amount of the resulting deficiencies in the quarterly contribution plus interest on such amounts from the date they were due at the rate of 1.0% per month or the maximum rate permitted by applicable law, whichever is less.

(e) The Tribe shall not conduct Class III gaming if more than two quarterly contributions to the Special Distribution Fund are overdue.

Sec. 6.0. LICENSING.

Sec. 6.1. Gaming Ordinance and Regulations. All Gaming Activities conducted under this Gaming Compact shall, at a minimum, comply with a Gaming Ordinance duly adopted by the Tribe and approved in accordance with IGRA, and with all rules, regulations, procedures, specifications, and standards duly adopted by the Tribal Gaming Agency.

Sec. 6.2. Tribal Ownership, Management, and Control of Gaming Operation. The Gaming Operations authorized under this Gaming Compact shall be owned solely by the Tribe.

Sec. 6.3. Prohibition Regarding Minors. (a) Except as provided in subdivision (b), the Tribe shall not permit persons under the age of 18 years to be present in any room in which Class III Gaming Activities are being conducted unless the person is en-route to a non-gaming area of the Gaming Facility.

(b) If the Tribe permits the consumption of alcoholic beverages in the Gaming Facility, the Tribe shall prohibit persons under the age of 21 years from being present in any area in which Class III gaming activities are being conducted and in which alcoholic beverages may be consumed, to the extent required by the state Department of Alcoholic Beverage Control.

Sec. 6.4. Licensing Requirements and Procedures.

Sec. 6.4.1. Summary of Licensing Principles. All persons in any way connected with the Gaming Operation or Facility who are required to be licensed or to submit to a background investigation under IGRA, and any others required to be licensed under this Gaming Compact, including, but not limited to, all Gaming Employees and Gaming Resource Suppliers, and any other person having a significant influence over the Gaming Operation must be licensed by the Tribal Gaming Agency. The parties intend that the licensing process provided for in this Gaming Compact shall involve joint cooperation between the Tribal Gaming Agency and the State Gaming Agency, as more particularly described herein.

Sec. 6.4.2. Gaming Facility. (a) The Gaming Facility authorized by this Gaming Compact shall be licensed by the Tribal Gaming Agency in conformity with the requirements of this Gaming Compact, the Tribal Gaming Ordinance, and IGRA. The license shall be reviewed and renewed, if appropriate, every two years thereafter. Verification that this requirement has been met shall be provided by the Tribe to the State Gaming Agency every two years. The Tribal Gaming Agency's certification to that effect shall be posted in a conspicuous and public place in the Gaming Facility at all times.

(b) In order to protect the health and safety of all Gaming Facility patrons, guests, and employees, all Gaming Facilities of the Tribe constructed after the effective date of this Gaming Compact, and all expansions or modifications to

a Gaming Facility in operation as of the effective date of this Compact, shall meet the building and safety codes of the Tribe, which, as a condition for engaging in that construction, expansion, modification, or renovation, shall amend its existing building and safety codes if necessary, or enact such codes if there are none, so that they meet the standards of either the building and safety codes of any county within the boundaries of which the site of the Facility is located, or the Uniform Building Codes, including all uniform fire, plumbing, electrical, mechanical, and related codes then in effect provided that nothing herein shall be deemed to confer jurisdiction upon any county or the State with respect to any reference to such building and safety codes. Any such construction, expansion or modification will also comply with the federal Americans with Disabilities Act, P.L. 101-336, as amended, 42 U.S.C. §§ 12101 et seq.

(c) Any Gaming Facility in which gaming authorized by this Gaming Compact is conducted shall be issued a certificate of occupancy by the Tribal Gaming Agency prior to occupancy if it was not used for any Gaming Activities under IGRA prior to the effective date of this Gaming Compact, or, if it was so used, within one year thereafter. The issuance of this certificate shall be reviewed for continuing compliance every two years thereafter. Inspections by qualified building and safety experts shall be conducted under the direction of the Tribal Gaming Agency as the basis for issuing any certificate hereunder. The Tribal Gaming Agency shall determine and certify that, as to new construction or new use for gaming, the Facility meets the Tribe's building and safety code, or, as to facilities or portions of facilities that were used for the Tribe's Gaming

Activities prior to this Gaming Compact, that the facility or portions thereof do not endanger the health or safety of occupants or the integrity of the Gaming Operation. The Tribe will not offer Class III gaming in a Facility that is constructed or maintained in a manner that endangers the health or safety of occupants or the integrity of the gaming operation.

(d) The State shall designate an agent or agents to be given reasonable notice of each inspection by the Tribal Gaming Agency's experts, which state agents may accompany any such inspection. The Tribe agrees to correct any Gaming Facility condition noted in an inspection that does not meet the standards set forth in subdivisions (b) and (c). The Tribal Gaming Agency and the State's designated agent or agents shall exchange any reports of an inspection within 10 days after completion of the report, which reports shall also be separately and simultaneously forwarded by both agencies to the Tribal Chairperson. Upon certification by the Tribal Gaming Agency's experts that a Gaming Facility meets applicable standards, the Tribal Gaming Agency shall forward the experts' certification to the State within 10 days of issuance. If the State's agent objects to that certification, the Tribe shall make a good faith effort to address the State's concerns, but if the State does not withdraw its objection, the matter will be resolved in accordance with the dispute resolution provisions of Section 9.0.

Sec. 6.4.3. Suitability Standard Regarding Gaming Licenses. (a) In reviewing an application for a gaming license, and in addition to any standards set forth in the Tribal Gaming Ordinance, the Tribal Gaming Agency shall consider whether issuance of the license is inimical to public health, safety, or

welfare, and whether issuance of the license will undermine public trust that the Tribe's Gaming Operations, or tribal government gaming generally, are free from criminal and dishonest elements and would be conducted honestly. A license may not be issued unless, based on all information and documents submitted, the Tribal Gaming Agency is satisfied that the applicant is all of the following, in addition to any other criteria in IGRA or the Tribal Gaming Ordinance:

(a) A person of good character, honesty, and integrity.

(b) A person whose prior activities, criminal record (if any), reputation, habits, and associations do not pose a threat to the public interest or to the effective regulation and control of gambling, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gambling, or in the carrying on of the business and financial arrangements incidental thereto.

(c) A person who is in all other respects qualified to be licensed as provided in this Gaming Compact, IGRA, the Tribal Gaming Ordinance, and any other criteria adopted by the Tribal Gaming Agency or the Tribe. An applicant shall not be found to be unsuitable solely on the ground that the applicant was an employee of a tribal gaming operation in California that was conducted prior to the effective date of this Compact.

Sec. 6.4.4. Gaming Employees. (a) Every Gaming Employee shall obtain, and thereafter maintain current, a valid tribal gaming license, which shall be subject to biennial renewal; provided that in accordance with Section 6.4.9,

those persons may be employed on a temporary or conditional basis pending completion of the licensing process.

(b) Except as provided in subdivisions (c) and (d), the Tribe will not employ or continue to employ, any person whose application to the State Gaming Agency for a determination of suitability, or for a renewal of such a determination, has been denied or has expired without renewal.

(c) Notwithstanding subdivision (a), the Tribe may retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if: (i) the person holds a valid and current license issued by the Tribal Gaming Agency that must be renewed at least biennially; (ii) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; (iii) the person is not an employee or agent of any other gaming operation; and (iv) the person has been in the continuous employ of the Tribe for at least three years prior to the effective date of this Compact.

(d) Notwithstanding subdivision (a), the Tribe may employ or retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if the person is an enrolled member of the Tribe, as defined in this subdivision, and if (i) the person holds a valid and current license issued by the Tribal Gaming Agency that must

be renewed at least biennially; (ii) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; and (iii) the person is not an employee or agent of any other gaming operation. For purposes of this subdivision, "enrolled member" means a person who is either (a) certified by the Tribe as having been a member of the Tribe for at least five (5) years, or (b) a holder of confirmation of membership issued by the Bureau of Indian Affairs.

(e) Nothing herein shall be construed to relieve any person of the obligation to apply for a renewal of a determination of suitability as required by Section 6.5.6.

Sec. 6.4.5. Gaming Resource Supplier. Any Gaming Resource Supplier who, directly or indirectly, provides, has provided, or is deemed likely to provide at least twenty-five thousand dollars ($25,000) in Gaming Resources in any 12-month period, or who has received at least twenty-five thousand dollars ($25,000) in any consecutive 12-month period within the 24-month period immediately preceding application, shall be licensed by the Tribal Gaming Agency prior to the sale, lease, or distribution, or further sale, lease, or distribution, of any such Gaming Resources to or in connection with the Tribe's Operation or Facility. These licenses shall be reviewed at least every two years for continuing compliance. In connection with such a review, the Tribal Gaming Agency shall require the Supplier to update all information provided in the previous application. For purposes of Section 6.5.2, such a review shall be deemed to

constitute an application for renewal. The Tribe shall not enter into, or continue to make payments pursuant to, any contract or agreement for the provision of Gaming Resources with any person whose application to the State Gaming Agency for a determination of suitability has been denied or has expired without renewal. Any agreement between the Tribe and a Gaming Resource Supplier shall be deemed to include a provision for its termination without further liability on the part of the Tribe, except for the bona fide repayment of all outstanding sums (exclusive of interest) owed as of, or payment for services or materials received up to, the date of termination, upon revocation or non-renewal of the Supplier's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency.

Sec. 6.4.6. Financial Sources. Any person extending financing, directly or indirectly, to the Tribe's Gaming Facility or Gaming Operation shall be licensed by the Tribal Gaming Agency prior to extending that financing, provided that any person who is extending financing at the time of the execution of this Compact shall be licensed by the Tribal Gaming Agency within ninety (90) days of such execution. These licenses shall be reviewed at least every two years for continuing compliance. In connection with such a review, the Tribal Gaming Agency shall require the Financial Source to update all information provided in the previous application. For purposes of Section 6.5.2, such a review shall be deemed to constitute an application for renewal. Any agreement between the Tribe and a Financial Source shall be deemed to include a provision for its termination without further liability on the part of the Tribe, except for the bona fide repayment of all outstanding sums (exclusive of interest) owed as of the

date of termination, upon revocation or non-renewal of the Financial Source's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency. The Tribe shall not enter into, or continue to make payments pursuant to, any contract or agreement for the provision of financing with any person whose application to the State Gaming Agency for a determination of suitability has been denied or has expired without renewal. A Gaming Resource Supplier who provides financing exclusively in connection with the sale or lease of Gaming Resources obtained from that Supplier may be licensed solely in accordance with licensing procedures applicable, if at all, to Gaming Resource Suppliers. The Tribal Gaming Agency may, at its discretion, exclude from the licensing requirements of this section, financing provided by a federally regulated or state-regulated bank, savings and loan, or other federally- or state-regulated lending institution; or any agency of the federal, state, or local government; or any investor who, alone or in conjunction with others, holds less than 10% of any outstanding indebtedness evidenced by bonds issued by the Tribe.

Sec. 6.4.7. Processing Tribal Gaming License Applications. Each applicant for a tribal gaming license shall submit the completed application along with the required information and an application fee, if required, to the Tribal Gaming Agency in accordance with the rules and regulations of that agency. At a minimum, the Tribal Gaming Agency shall require submission and consideration of all information required under IGRA, including Section 556.4 of Title 25 of the Code of Federal Regulations, for licensing primary management officials and key employees. For applicants who

are business entities, these licensing provisions shall apply to the entity as well as: (i) each of its officers and directors; (ii) each of its principal management employees, including any chief executive officer, chief financial officer, chief operating officer, and general manager; (iii) each of its owners or partners, if an unincorporated business; (iv) each of its shareholders who owns more than 10 percent of the shares of the corporation, if a corporation; and (v) each person or entity (other than a financial institution that the Tribal Gaming Agency has determined does not require a license under the preceding section) that, alone or in combination with others, has provided financing in connection with any gaming authorized under this Gaming Compact, if that person or entity provided more than 10 percent of (a) the start-up capital, (b) the operating capital over a 12-month period, or (c) a combination thereof. For purposes of this Section, where there is any commonality of the characteristics identified in clauses (i) to (v), inclusive, between any two or more entities, those entities may be deemed to be a single entity. Nothing herein precludes the Tribe or Tribal Gaming Agency from requiring more stringent licensing requirements.

Sec. 6.4.8. Background Investigations of Applicants. The Tribal Gaming Agency shall conduct or cause to be conducted all necessary background investigations reasonably required to determine that the applicant is qualified for a gaming license under the standards set forth in Section 6.4.3, and to fulfill all requirements for licensing under IGRA, the Tribal Gaming Ordinance, and this Gaming Compact. The Tribal Gaming Agency shall not issue other than a temporary license until a determination is made that those qualifications have been met. In lieu of completing its own background

investigation, and to the extent that doing so does not conflict with or violate IGRA or the Tribal Gaming Ordinance, the Tribal Gaming Agency may contract with the State Gaming Agency for the conduct of background investigations, may rely on a state certification of non-objection previously issued under a gaming compact involving another tribe, or may rely on a State gaming license previously issued to the applicant, to fulfill some or all of the Tribal Gaming Agency's background investigation obligation. An applicant for a tribal gaming license shall be required to provide releases to the State Gaming Agency to make available to the Tribal Gaming Agency background information regarding the applicant. The State Gaming Agency shall cooperate in furnishing to the Tribal Gaming Agency that information, unless doing so would violate any agreement the State Gaming Agency has with a source of the information other than the applicant, or would impair or impede a criminal investigation, or unless the Tribal Gaming Agency cannot provide sufficient safeguards to assure the State Gaming Agency that the information will remain confidential or that provision of the information would violate state or federal law. If the Tribe adopts an ordinance confirming that Article 6 (commencing with section 11140) of Chapter 1 of Title 1 of Part 4 of the California Penal Code is applicable to members, investigators, and staff of the Tribal Gaming Agency, and those members, investigators, and staff thereafter comply with that ordinance, then, for purposes of carrying out its obligations under this Section, the Tribal Gaming Agency shall be considered to be an entity entitled to receive state summary criminal history information within the meaning of subdivision (b)(12) of section 11105 of the California Penal Code. The California Department of Justice shall provide services to the Tribal Gaming Agency through

the California Law Enforcement Telecommunications System (CLETS), subject to a determination by the CLETS advisory committee that the Tribal Gaming Agency is qualified for receipt of such services, and on such terms and conditions as are deemed reasonable by that advisory committee.

Sec. 6.4.9. Temporary Licensing of Gaming Employees. Notwithstanding anything herein to the contrary, if the applicant has completed a license application in a manner satisfactory to the Tribal Gaming Agency, and that agency has conducted a preliminary background investigation, and the investigation or other information held by that agency does not indicate that the applicant has a criminal history or other information in his or her background that would either automatically disqualify the applicant from obtaining a license or cause a reasonable person to investigate further before issuing a license, or is otherwise unsuitable for licensing, the Tribal Gaming Agency may issue a temporary license and may impose such specific conditions thereon pending completion of the applicant's background investigation, as the Tribal Gaming Agency in its sole discretion shall determine. Special fees may be required by the Tribal Gaming Agency to issue or maintain a temporary license. A temporary license shall remain in effect until suspended or revoked, or a final determination is made on the application. At any time after issuance of a temporary license, the Tribal Gaming Agency may suspend or revoke it in accordance with Sections 6.5.1 or 6.5.5, and the State Gaming Agency may request suspension or revocation in accordance with subdivision (d) of Section 6.5.6. Nothing herein shall be construed to relieve the Tribe of any obligation under Part 558 of Title 25 of the Code of Federal Regulations.

Sec. 6.5. Gaming License Issuance. Upon completion of the necessary background investigation, the Tribal Gaming Agency may issue a license on a conditional or unconditional basis. Nothing herein shall create a property or other right of an applicant in an opportunity to be licensed, or in a license itself, both of which shall be considered to be privileges granted to the applicant in the sole discretion of the Tribal Gaming Agency.

Sec. 6.5.1. Denial, Suspension, or Revocation of Licenses. (a) Any application for a gaming license may be denied, and any license issued may be revoked, if the Tribal Gaming Agency determines that the application is incomplete or deficient, or if the applicant is determined to be unsuitable or otherwise unqualified for a gaming license. Pending consideration of revocation, the Tribal Gaming Agency may suspend a license in accordance with Section 6.5.5. All rights to notice and hearing shall be governed by tribal law, as to which the applicant will be notified in writing along with notice of an intent to suspend or revoke the license.

(b) (i) Except as provided in paragraph (ii) below, upon receipt of notice that the State Gaming Agency has determined that a person would be unsuitable for licensure in a gambling establishment subject to the jurisdiction of the State Gaming Agency, the Tribal Gaming Agency shall promptly revoke any license that has theretofore been issued to the person; provided that the Tribal Gaming Agency may, in its discretion, re-issue a license to the person following entry of a final judgment reversing the determination of the State Gaming Agency in a proceeding in state court conducted pursuant to section 1085 of the California Civil Code.

(ii) Notwithstanding a determination of unsuitability by the State Gaming Agency, the Tribal Gaming Agency may, in its discretion, decline to revoke a tribal license issued to a person employed by the Tribe pursuant to Section 6.4.4(c) or Section 6.4.4(d).

Sec. 6.5.2. Renewal of Licenses; Extensions; Further Investigation. The term of a tribal gaming license shall not exceed two years, and application for renewal of a license must be made prior to its expiration. Applicants for renewal of a license shall provide updated material as requested, on the appropriate renewal forms, but, at the discretion of the Tribal Gaming Agency, may not be required to resubmit historical data previously submitted or that is otherwise available to the Tribal Gaming Agency. At the discretion of the Tribal Gaming Agency, an additional background investigation may be required at any time if the Tribal Gaming Agency determines the need for further information concerning the applicant's continuing suitability or eligibility for a license. Prior to renewing a license, the Tribal Gaming Agency shall deliver to the State Gaming Agency copies of all information and documents received in connection with the application for renewal.

Sec. 6.5.3. Identification Cards. The Tribal Gaming Agency shall require that all persons who are required to be licensed wear, in plain view at all times while in the Gaming Facility, identification badges issued by the Tribal Gaming Agency. Identification badges must display information including, but not limited to, a photograph and an identification number that is adequate to enable agents of the Tribal Gaming Agency to readily identify the person and

determine the validity and date of expiration of his or her license.

Sec. 6.5.4. Fees for Tribal License. The fees for all tribal licenses shall be set by the Tribal Gaming Agency.

Sec. 6.5.5. Suspension of Tribal License. The Tribal Gaming Agency may summarily suspend the license of any employee if the Tribal Gaming Agency determines that the continued licensing of the person or entity could constitute a threat to the public health or safety or may violate the Tribal Gaming Agency's licensing or other standards. Any right to notice or hearing in regard thereto shall be governed by Tribal law.

Sec. 6.5.6. State Certification Process. (a) Upon receipt of a completed license application and a determination by the Tribal Gaming Agency that it intends to issue the earlier of a temporary or permanent license, the Tribal Gaming Agency shall transmit to the State Gaming Agency a notice of intent to license the applicant, together with all of the following: (i) a copy of all tribal license application materials and information received by the Tribal Gaming Agency from the applicant; (ii) an original set of fingerprint cards; (iii) a current photograph; and (iv) except to the extent waived by the State Gaming Agency, such releases of information, waivers, and other completed and executed forms as have been obtained by the Tribal Gaming Agency. Except for an applicant for licensing as a non-key Gaming Employee, as defined by agreement between the Tribal Gaming Agency and the State Gaming Agency, the Tribal Gaming Agency shall require the applicant also to file an

application with the State Gaming Agency, prior to issuance of a temporary or permanent tribal gaming license, for a determination of suitability for licensure under the California Gambling Control Act. Investigation and disposition of that application shall be governed entirely by state law, and the State Gaming Agency shall determine whether the applicant would be found suitable for licensure in a gambling establishment subject to that Agency's jurisdiction. Additional information may be required by the State Gaming Agency to assist it in its background investigation, provided that such State Gaming Agency requirement shall be no greater than that which may be required of applicants for a State gaming license in connection with nontribal gaming activities and at a similar level of participation or employment. A determination of suitability is valid for the term of the tribal license held by the applicant, and the Tribal Gaming Agency shall require a licensee to apply for renewal of a determination of suitability at such time as the licensee applies for renewal of a tribal gaming license. The State Gaming Agency and the Tribal Gaming Agency (together with tribal gaming agencies under other gaming compacts) shall cooperate in developing standard licensing forms for tribal gaming license applicants, on a statewide basis, that reduce or eliminate duplicative or excessive paperwork, which forms and procedures shall take into account the Tribe's requirements under IGRA and the expense thereof.

(b) Background Investigations of Applicants. Upon receipt of completed license application information from the Tribal Gaming Agency, the State Gaming Agency may conduct a background investigation pursuant to state law to determine whether the applicant would be suitable to be

licensed for association with a gambling establishment subject to the jurisdiction of the State Gaming Agency. If further investigation is required to supplement the investigation conducted by the Tribal Gaming Agency, the applicant will be required to pay the statutory application fee charged by the State Gaming Agency pursuant to California Business and Professions Code section 19941(a), but any deposit requested by the State Gaming Agency pursuant to section 19855 of that Code shall take into account reports of the background investigation already conducted by the Tribal Gaming Agency and the NIGC, if any. Failure to pay the application fee or deposit may be grounds for denial of the application by the State Gaming Agency. The State Gaming Agency and Tribal Gaming Agency shall cooperate in sharing as much background information as possible, both to maximize investigative efficiency and thoroughness, and to minimize investigative costs. Upon completion of the necessary background investigation or other verification of suitability, the State Gaming Agency shall issue a notice to the Tribal Gaming Agency certifying that the State has determined that the applicant would be suitable, or that the applicant would be unsuitable, for licensure in a gambling establishment subject to the jurisdiction of the State Gaming Agency and, if unsuitable, stating the reasons therefor.

(c) The Tribe shall monthly provide the State Gaming Agency with the name, badge identification number, and job descriptions of all non-key Gaming Employees.

(d) Prior to denying an application for a determination of suitability, the State Gaming Agency shall notify the Tribal Gaming Agency and afford the Tribe an opportunity to be

heard. If the State Gaming Agency denies an application for a determination of suitability, that Agency shall provide the applicant with written notice of all appeal rights available under state law.

Sec. 7.0. COMPLIANCE ENFORCEMENT.

Sec. 7.1. On-Site Regulation. It is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of this Gaming Compact, IGRA, and the Tribal Gaming Ordinance with respect to Gaming Operation and Facility compliance, and to protect the integrity of the Gaming Activities, the reputation of the Tribe and the Gaming Operation for honesty and fairness, and the confidence of patrons that tribal government gaming in California meets the highest standards of regulation and internal controls. To meet those responsibilities, the Tribal Gaming Agency shall adopt and enforce regulations, procedures, and practices as set forth herein.

Sec. 7.2. Investigation and Sanctions. The Tribal Gaming Agency shall investigate any reported violation of this Gaming Compact and shall require the Gaming Operation to correct the violation upon such terms and conditions as the Tribal Gaming Agency determines are necessary. The Tribal Gaming Agency shall be empowered by the Tribal Gaming Ordinance to impose fines or other sanctions within the jurisdiction of the Tribe against gaming licensees or other persons who interfere with or violate the Tribe's gaming regulatory requirements and obligations under IGRA, the Tribal Gaming Ordinance, or this Gaming Compact. The

Tribal Gaming Agency shall report significant or continued violations of this Compact or failures to comply with its orders to the State Gaming Agency.

Sec. 7.3. Assistance by State Gaming Agency. The Tribe may request the assistance of the State Gaming Agency whenever it reasonably appears that such assistance may be necessary to carry out the purposes described in Section 7.1, or otherwise to protect public health, safety, or welfare. If requested by the Tribe or Tribal Gaming Agency, the State Gaming Agency shall provide requested services to ensure proper compliance with this Gaming Compact. The State shall be reimbursed for its actual and reasonable costs of that assistance, if the assistance required expenditure of extraordinary costs.

Sec. 7.4. Access to Premises by State Gaming Agency; Notification; Inspections. Notwithstanding that the Tribe has the primary responsibility to administer and enforce the regulatory requirements of this Compact, the State Gaming Agency shall have the right to inspect the Tribe's Gaming Facility with respect to Class III Gaming Activities only, and all Gaming Operation or Facility records relating thereto, subject to the following conditions:

Sec. 7.4.1. Inspection of public areas of a Gaming Facility may be made at any time without prior notice during normal Gaming Facility business hours.

Sec. 7.4.2. Inspection of areas of a Gaming Facility not normally accessible to the public may be made at any time during normal Gaming Facility business hours, immediately

after the State Gaming Agency's authorized inspector notifies the Tribal Gaming Agency of his or her presence on the premises, presents proper identification, and requests access to the non-public areas of the Gaming Facility. The Tribal Gaming Agency, in its sole discretion, may require a member of the Tribal Gaming Agency to accompany the State Gaming Agency inspector at all times that the State Gaming Agency inspector is in a non-public area of the Gaming Facility. If the Tribal Gaming Agency imposes such a requirement, it shall require such member to be available at all times for those purposes and shall ensure that the member has the ability to gain immediate access to all non-public areas of the Gaming Facility. Nothing in this Compact shall be construed to limit the State Gaming Agency to one inspector during inspections.

Sec. 7.4.3. (a) Inspection and copying of Gaming Operation papers, books, and records may occur at any time, immediately after notice to the Tribal Gaming Agency, during the normal hours of the Gaming Facility's business office, provided that the inspection and copying of those papers, books or records shall not interfere with the normal functioning of the Gaming Operation or Facility. Notwithstanding any other provision of California law, all information and records that the State Gaming Agency obtains, inspects, or copies pursuant to this Gaming Compact shall be, and remain, the property solely of the Tribe; provided that such records and copies may be retained by the State Gaming Agency as reasonably necessary for completion of any investigation of the Tribe's compliance with this Compact.

(b)(i) The State Gaming Agency will exercise utmost care in the preservation of the confidentiality of any and all information and documents received from the Tribe, and will apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure. The Tribe may avail itself of any and all remedies under state law for improper disclosure of information or documents. To the extent reasonably feasible, the State Gaming Agency will consult with representatives of the Tribe prior to disclosure of any documents received from the Tribe, or any documents compiled from such documents or from information received from the Tribe, including any disclosure compelled by judicial process, and, in the case of any disclosure compelled by judicial process, will endeavor to give the Tribe immediate notice of the order compelling disclosure and a reasonable opportunity to interpose an objection thereto with the court.

(ii) The Tribal Gaming Agency and the State Gaming Agency shall confer and agree upon protocols for release to other law enforcement agencies of information obtained during the course of background investigations.

(c) Records received by the State Gaming Agency from the Tribe in compliance with this Compact, or information compiled by the State Gaming Agency from those records, shall be exempt from disclosure under the California Public Records Act.

Sec. 7.4.4. Notwithstanding any other provision of this Compact, the State Gaming Agency shall not be denied access to papers, books, records, equipment, or places where

such access is reasonably necessary to ensure compliance with this Compact.

Sec. 7.4.5. (a) Subject to the provisions of subdivision (b), the Tribal Gaming Agency shall not permit any Gaming Device to be transported to or from the Tribe's land except in accordance with procedures established by agreement between the State Gaming Agency and the Tribal Gaming Agency and upon at least 10 days' notice to the Sheriff's Department for the county in which the land is located.

(b) Transportation of a Gaming Device from the Gaming Facility within California is permissible only if: (i) The final destination of the device is a gaming facility of any tribe in California that has a compact with the State; (ii) The final destination of the device is any other state in which possession of the device or devices is made lawful by state law or by tribal-state compact; (iii) The final destination of the device is another country, or any state or province of another country, wherein possession of the device is lawful; or (iv) The final destination is a location within California for testing, repair, maintenance, or storage by a person or entity that has been licensed by the Tribal Gaming Agency and has been found suitable for licensure by the State Gaming Agency.

(c) Gaming Devices transported off the Tribe's land in violation of this Section 7.4.5 or in violation of any permit issued pursuant thereto is subject to summary seizure by California peace officers.

Sec. 8.0. RULES AND REGULATIONS FOR THE OPERATION AND MANAGEMENT OF THE TRIBAL GAMING OPERATION.

Sec. 8.1. Adoption of Regulations for Operation and Management; Minimum Standards. In order to meet the goals set forth in this Gaming Compact and required of the Tribe by law, the Tribal Gaming Agency shall be vested with the authority to promulgate, and shall promulgate, at a minimum, rules and regulations or specifications governing the following subjects, and to ensure their enforcement in an effective manner:

Sec. 8.1.1. The enforcement of all relevant laws and rules with respect to the Gaming Operation and Facility, and the power to conduct investigations and hearings with respect thereto, and to any other subject within its jurisdiction.

Sec. 8.1.2. Ensuring the physical safety of Gaming Operation patrons and employees, and any other person while in the Gaming Facility. Nothing herein shall be construed to make applicable to the Tribe any state laws, regulations, or standards governing the use of tobacco.

Sec. 8.1.3. The physical safeguarding of assets transported to, within, and from the Gaming Facility.

Sec. 8.1.4. The prevention of illegal activity from occurring within the Gaming Facility or with regard to the Gaming Operation, including, but not limited to, the maintenance of employee procedures and a surveillance system as provided below.

Sec. 8.1.5. The recording of any and all occurrences within the Gaming Facility that deviate from normal operating policies and procedures (hereafter "incidents"). The procedure for recording incidents shall: (1) specify that security personnel record all incidents, regardless of an employee's determination that the incident may be immaterial (all incidents shall be identified in writing); (2) require the assignment of a sequential number to each report; (3) provide for permanent reporting in indelible ink in a bound notebook from which pages cannot be removed and in which entries are made on each side of each page; and (4) require that each report include, at a minimum, all of the following:

(a) The record number.

(b) The date.

(c) The time.

(d) The location of the incident.

(e) A detailed description of the incident.

(f) The persons involved in the incident.

(g) The security department employee assigned to the incident.

Sec. 8.1.6. The establishment of employee procedures designed to permit detection of any irregularities, theft, cheating, fraud, or the like, consistent with industry practice.

Sec. 8.1.7. Maintenance of a list of persons barred from the Gaming Facility who, because of their past behavior, criminal history, or association with persons or organizations, pose a threat to the integrity of the Gaming Activities of the Tribe or to the integrity of regulated gaming within the State.

Sec. 8.1.8. The conduct of an audit of the Gaming Operation, not less than annually, by an independent certified public accountant, in accordance with the auditing and accounting standards for audits of casinos of the American Institute of Certified Public Accountants.

Sec. 8.1.9. Submission to, and prior approval, from the Tribal Gaming Agency of the rules and regulations of each Class III game to be operated by the Tribe, and of any changes in those rules and regulations. No Class III game may be played that has not received Tribal Gaming Agency approval.

Sec. 8.1.10. Addressing all of the following:

(a) Maintenance of a copy of the rules, regulations, and procedures for each game as played, including, but not limited to, the method of play and the odds and method of determining amounts paid to winners;

(b) Specifications and standards to ensure that information regarding the method of play, odds, and payoff determinations shall be visibly displayed or available to patrons in written form in the Gaming Facility;

(c) Specifications ensuring that betting limits applicable to any gaming station shall be displayed at that gaming station;

(d) Procedures ensuring that in the event of a patron dispute over the application of any gaming rule or regulation, the matter shall be handled in accordance with, industry practice and principles of fairness, pursuant to the Tribal Gaming Ordinance and any rules and regulations promulgated by the Tribal Gaming Agency.

Sec. 8.1.11. Maintenance of a closed-circuit television surveillance system consistent with industry standards for gaming facilities of the type and scale operated by the Tribe, which system shall be approved by, and may not be modified without the approval of, the Tribal Gaming Agency. The Tribal Gaming Agency shall have current copies of the Gaming Facility floor plan and closed-circuit television system at all times, and any modifications thereof first shall be approved by the Tribal Gaming Agency.

Sec. 8.1.12. Maintenance of a cashier's cage in accordance with industry standards for such facilities.

Sec. 8.1.13. Specification of minimum staff and supervisory requirements for each Gaming Activity to be conducted.

Sec. 8.1.14. Technical standards and specifications for the operation of Gaming Devices and other games authorized herein to be conducted by the Tribe, which technical specifications may be no less stringent than those approved by

a recognized gaming testing laboratory in the gaming industry.

Sec. 8.2. State Civil and Criminal Jurisdiction. Nothing in this Gaming Compact affects the civil or criminal jurisdiction of the State under Public Law 280 (18 U.S.C. Sec. 1162; 28 U.S.C. Sec. 1360) or IGRA, to the extent applicable. In addition, criminal jurisdiction to enforce state gambling laws is transferred to the State pursuant to 18 U.S.C. §§ 1166(d), provided that no Gaming Activity conducted by the Tribe pursuant to this Gaming Compact may be deemed to be a civil or criminal violation of any law of the State.

Sec. 8.3. (a) The Tribe shall take all reasonable steps to ensure that members of the Tribal Gaming Agency are free from corruption, undue influence, compromise, and conflicting interests in the conduct of their duties under this Compact; shall adopt a conflict-of-interest code to that end; and shall ensure the prompt removal of any member of the Tribal Gaming Agency who is found to have acted in a corrupt or compromised manner.

(b) The Tribe shall conduct a background investigation on a prospective member of the Tribal Gaming Agency, who shall meet the background requirements of a management contractor under IGRA; provided that, if such official is elected through a tribal election process, that official may not participate in any Tribal Gaming Agency matters under this Compact unless a background investigation has been concluded and the official has been found to be suitable. If requested by the tribal government or the Tribal Gaming

Agency, the State Gaming Agency assist in the conduct of such a background investigation and may assist in the investigation of any possible corruption or compromise of a member of the agency.

Sec. 8.4. In order to foster statewide uniformity of regulation of Class III gaming operations throughout the state, rules, regulations, standards, specifications, and procedures of the Tribal Gaming Agency in respect to any matter encompassed by Sections 6.0, 7.0, or 8.0 shall be consistent with regulations adopted by the State Gaming Agency in accordance with Section 8.4.1. Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the California Government Code does not apply to regulations adopted by the State Gaming Agency in respect to tribal gaming operations under this Section.

Sec. 8.4.1. (a) Except as provided in subdivision (d), no State Gaming Agency regulation shall be effective with respect to the Tribe's Gaming Operation unless it has first been approved by the Association and the Tribe has had an opportunity to review and comment on the proposed regulation.

(b) Every State Gaming Agency regulation that is intended to apply to the Tribe (other than a regulation proposed or previously approved by the Association) shall be submitted to the Association for consideration prior to submission of the regulation to the Tribe for comment as provided in subdivision (c). A regulation that is disapproved by the Association shall not be submitted to the Tribe for comment unless it is re-adopted by the State Gaming Agency

as a proposed regulation, in its original or amended form, with a detailed, written response to the Association's objections.

(c) Except as provided in subdivision (d), no regulation of the State Gaming Agency shall be adopted as a final regulation in respect to the Tribe's Gaming Operation before the expiration of 30 days after submission of the proposed regulation to the Tribe for comment as a proposed regulation, and after consideration of the Tribe's comments, if any.

(d) In exigent circumstances (e.g., imminent threat to public health and safety), the State Gaming Agency may adopt a regulation that becomes effective immediately. Any such regulation shall be accompanied by a detailed, written description of the exigent circumstances, and shall be submitted immediately to the Association for consideration. If the regulation is disapproved by the Association, it shall cease to be effective, but may be re-adopted by the State Gaming Agency as a proposed regulation, in its original or amended form, with a detailed, written response to the Association's objections, and thereafter submitted to the Tribe for comment as provided in subdivision (c).

(e) The Tribe may object to a State Gaming Agency regulation on the ground that it is unnecessary, unduly burdensome, or unfairly discriminatory, and may seek repeal or amendment of the regulation through the dispute resolution process of Section 9.0.

Sec. 9.0. DISPUTE RESOLUTION PROVISIONS.

Sec. 9.1. Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve disputes that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact, as follows:

(a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved.

(b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time.

(c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration.

(d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact, or failure to negotiate in good faith as required by the terms of this Compact. In no event may the Tribe be precluded from pursuing any arbitration or judicial remedy against the State on the grounds that the Tribe has failed to exhaust its state administrative remedies. The parties agree that, except in the case of imminent threat to the public health or safety, reasonable efforts will be made to explore alternative dispute resolution avenues prior to resort to judicial process.

Sec. 9.2. Arbitration Rules. Arbitration shall be conducted in accordance with the policies and procedures of the Commercial Arbitration Rules of the American Arbitration Association, and shall be held on the Tribe's land or, if unreasonably inconvenient under the circumstances, at such other location as the parties may agree. Each side shall bear its own costs, attorneys' fees, and one-half the costs and expenses of the American Arbitration Association and the arbitrator, unless the arbitrator rules otherwise. Only one neutral arbitrator may be named, unless the Tribe or the State objects, in which case a panel of three arbitrators (one of whom is selected by each party) will be named. The provisions of Section 1283.05 of the California Code of Civil Procedure shall apply; provided that no discovery authorized

by that section may be conducted without leave of the arbitrator. The decision of the arbitrator shall be in writing, give reasons for the decision, and shall be binding. Judgment on tne award may be entered in any federal or state court having jurisdiction thereof.

Sec. 9.3. No Waiver or Preclusion of Other Means of Dispute Resolution. This Section 9.0 may not be construed to waive, limit, or restrict any remedy that is otherwise available to either party, nor may this Section be construed to preclude, limit, or restrict the ability of the parties to pursue, by mutual agreement, any other method of dispute resolution, including, but not limited to, mediation or utilization of a technical advisor to the Tribal and State Gaming Agencies; provided that neither party is under any obligation to agree to such alternative method of dispute resolution.

Sec. 9.4. Limited Waiver of Sovereign Immunity. (a) In the event that a dispute is to be resolved in federal court or a state court of competent jurisdiction as provided in this Section 9.0, the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:

(1) The dispute is limited solely to issues arising under this Gaming Compact;

(2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); and

(3) No person or entity other than the Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

(b) In the event of intervention by any additional party into any such action without the consent of the Tribe and the State, the waivers of either the Tribe or the State provided for herein may be revoked, unless joinder is required to preserve the court's jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

(c) The waivers and consents provided for under this Section 9.0 shall extend to civil actions authorized by this Compact, including, but not limited to, actions to compel arbitration, any arbitration proceeding herein, any action to confirm or enforce any judgment or arbitration award as provided herein, and any appellate proceedings emanating from a matter in which an immunity waiver has been granted. Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party.

Sec. 10.0. PUBLIC AND WORKPLACE HEALTH, SAFETY, AND LIABILITY.

Sec. 10.1. The Tribe will not conduct Class III gaming in a manner that endangers the public health, safety, or welfare; provided that nothing herein shall be construed to

make applicable to the Tribe any state laws or regulations governing the use of tobacco.

Sec. 10.2. Compliance. For the purposes of this Gaming Compact, the Tribal Gaming Operation shall:

(a) Adopt and comply with standards no less stringent than state public health standards for food and beverage handling. The Gaming Operation will allow inspection of food and beverage services by state or county health inspectors, during normal hours of operation, to assess compliance with these standards, unless inspections are routinely made by an agency of the United States government to ensure compliance with equivalent standards of the United States Public Health Service. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state or county health inspectors, but any alleged violations of the standards shall be treated as alleged violations of this Compact.

(b) Adopt and comply with standards no less stringent than federal water quality and safe drinking water standards applicable in California; the Gaming Operation will allow for inspection and testing of water quality by state or county health inspectors, as applicable, during normal hours of operation, to assess compliance with these standards, unless inspections and testing are made by an agency of the United States pursuant to, or by the Tribe under express authorization of, federal law, to ensure compliance with federal water quality and safe drinking water standards. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state or county health inspectors, but any

alleged violations of the standards shall be treated as alleged violations of this Compact.

(c) Comply with the building and safety standards set forth in Section 6.4.

(d) Carry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and that the Tribe provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid; provided that nothing herein requires the Tribe to agree to liability for punitive damages or attorneys' fees. On or before the effective date of this Compact or not less than 30 days prior to the commencement of Gaming Activities under this Compact, whichever is later, the Tribe shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person or property at the Gaming Facility or in connection with the Tribe's Gaming Operation, including procedures for processing any claims for such money damages; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits set out above.

(e) Adopt and comply with standards no less stringent than federal workplace and occupational health and safety standards; the Gaming Operation will allow for inspection of Gaming Facility workplaces by state inspectors, during normal hours of operation, to assess compliance with these standards, unless inspections are regularly made by an agency

of the United States government to ensure compliance with federal workplace and occupational health and safety standards. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state inspectors, but any alleged violations of the standards shall be treated as alleged violations of this Compact.

(f) Comply with tribal codes and other applicable federal law regarding public health and safety.

(g) Adopt and comply with standards no less stringent than federal laws and state laws forbidding employers generally from discriminating in the employment of persons to work for the Gaming Operation or in the Gaming Facility on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability; provided that nothing herein shall preclude the tribe from giving a preference in employment to Indians, pursuant to a duly adopted tribal ordinance.

(h) Adopt and comply with standards that are no less stringent than state laws prohibiting a gaming enterprise from cashing any check drawn against a federal, state, county, or city fund, including but not limited to, Social Security, unemployment insurance, disability payments, or public assistance payments.

(i) Adopt and comply with standards that are no less stringent than state laws, if any, prohibiting a gaming enterprise from providing, allowing, contracting to provide, or arranging to provide alcoholic beverages, or food or lodging for no charge or at reduced prices at a gambling

establishment or lodging facility as an incentive or enticement.

(j) Adopt and comply with standards that are no less stringent than state laws, if any, prohibiting extensions of credit.

(k) Provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. Sec. 5311-5314, as amended, and all reporting requirements of the Internal Revenue Service, insofar as such provisions and reporting requirements are applicable to casinos.

Sec. 10.2.1. The Tribe shall adopt and, not later than 30 days after the effective date of this Compact, shall make available on request the standards described in subdivisions (a)-(c) and (e)-(k) of Section 10.2 to which the Gaming Operation is held. In the absence of a promulgated tribal standard in respect to a matter identified in those subdivisions, or the express adoption of an applicable federal statute or regulation in lieu of a tribal standard in respect to any such matter, the applicable state statute or regulation shall be deemed to have been adopted by the Tribe as the applicable standard.

Sec. 10.3 Participation in state statutory programs related to employment. (a) In lieu of permitting the Gaming Operation to participate in the state statutory workers' compensation system, the Tribe may create and maintain a system that provides redress for employee work-related injuries through requiring insurance or self-insurance, which system must include a scope of coverage, availability of an

independent medical examination, right to notice, hearings before an independent tribunal, a means of enforcement against the employer, and benefits comparable to those mandated for comparable employees under state law. Not later than the effective date of this Compact, or 60 days prior to the commencement of Gaming Activities under this Compact, the Tribe will advise the State of its election to participate in the statutory workers' compensation system or, alternatively, will forward to the State all relevant ordinances that have been adopted and all other documents establishing the system and demonstrating that the system is fully operational and compliant with the comparability standard set forth above. The parties agree that independent contractors doing business with the Tribe must comply with all state workers' compensation laws and obligations.

(b) The Tribe agrees that its Gaming Operation will participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming Facility, including compliance with the provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the state agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement.

(c) As a matter of comity, with respect to persons employed at the Gaming Facility, other than members of the Tribe, the Tribal Gaming Operation shall withhold all taxes due to the State as provided in the California Unemployment Insurance Code and the Revenue and Taxation Code, and

shall forward such amounts as provided in said Codes to the State.

Sec. 10.4. Emergency Service Accessibility. The Tribe shall make reasonable provisions for adequate emergency fire, medical, and related relief and disaster services for patrons and employees of the Gaming Facility.

Sec. 10.5. Alcoholic Beverage Service. Standards for alcohol service shall be subject to applicable law.

Sec. 10.6. Possession of firearms shall be prohibited at all times in the Gaming Facility except for state, local, or tribal security or law enforcement personnel authorized by tribal law and by federal or state law to possess fire arms at the Facility.

Sec. 10.7. Labor Relations.

Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Sec. 10.8. Off-Reservation Environmental Impacts.

Sec. 10.8.1. On or before the effective date of this Compact, or not less than 90 days prior to the commencement of a Project, as defined herein, the Tribe shall adopt an ordinance providing for the preparation, circulation, and consideration by the Tribe of environmental impact reports concerning potential off-Reservation environmental impacts of any and all Projects to be commenced on or after the effective date of this Compact. In fashioning the environmental protection ordinance, the Tribe will make a good faith effort to incorporate the policies and purposes of the National Environmental Policy Act and the California Environmental Quality Act consistent with the Tribe's governmental interests.

Sec. 10.8.2. (a) Prior to commencement of a Project, the Tribe will:

(1) Inform the public of the planned Project

(2) Take appropriate actions to determine whether the project will have any significant adverse impacts on the off-Reservation environment;

(3) For the purpose of receiving and responding to comments, submit all environmental impact reports concerning the proposed Project to the State Clearinghouse in the Office of Planning and Research and the county board of supervisors, for distribution to the public.

(4) Consult with the board of supervisors of the county or counties within which the Tribe's Gaming Facility is located, or is to be located, and, if the Gaming Facility is within a city, with the city council, and if requested by the board or council, as the case may be, meet with them to discuss mitigation of significant adverse off-Reservation environmental impacts;

(5) Meet with and provide an opportunity for comment by those members of the public residing off-Reservation within the vicinity of the Gaming Facility such as might be adversely affected by proposed Project.

(b) During the conduct of a Project, the Tribe shall:

(1) Keep the board or council, as the case may be, and potentially affected members of the public apprized of the project's progress; and

(2) Make good faith efforts to mitigate any and all such significant adverse off-Reservation environmental impacts.

(c) As used in Section 10.8.1 and this Section 10.8.2, the term "Project" means any expansion or any significant renovation or modification of an existing Gaming Facility, or any significant excavation, construction, or development associated with the Tribe's Gaming Facility or proposed Gaming Facility and the term "environmental impact reports" means any environmental assessment, environmental impact report, or environmental impact statement, as the case may be.

Sec. 10.8.3. (a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated.

(b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith.

(c) On or after January 1, 2004, the Tribe may bring an action in federal court under 25 U.S.C. Sec. 2710(d)(7)(A)(i) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith. If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. Sec. 2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause

adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State.

Sec. 11.0. EFFECTIVE DATE AND TERM OF COMPACT.

Sec. 11.1. Effective Date. This Gaming Compact shall not be effective unless and until all of the following have occurred:

(a) The Compact is ratified by statute in accordance with state law;

(b) Notice of approval or constructive approval is published in the Federal Register as provided in 25 U.S.C. 2710(d)(3)(B); and

(c) SCA 11 is approved by the California voters in the March 2000 general election.

Sec. 11.2. Term of Compact; Termination.

Sec. 11.2.1. Effective. (a) Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020.

(b) Once ratified, this Compact shall constitute a binding and determinative agreement between the Tribe and the State, without regard to voter approval of any constitutional amendment, other than SCA 11, that authorizes a gaming compact.

(c) Either party may bring an action in federal court, after providing a sixty (60) day written notice of an opportunity to cure any alleged breach of this Compact, for a declaration that the other party has materially breached this Compact. Upon issuance of such a declaration, the complaining party may unilaterally terminate this Compact upon service of written notice on the other party. In the event a federal court determines that it lacks jurisdiction over such an action, the action may be brought in the superior court for the county in which the Tribe's Gaming Facility is located. The parties expressly waive their immunity to suit for purposes of an action under this subdivision, subject to the qualifications stated in Section 9.4(a).

Sec. 12.0. AMENDMENTS; RENEGOTIATIONS.

Sec. 12.1. The terms and conditions of this Gaming Compact may be amended at any time by the mutual and written agreement of both parties.

Sec. 12.2. This Gaming Compact is subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized herein and requests renegotiation for that purpose, provided that no such renegotiation may be sought for 12 months following the effective date of this Gaming Compact.

Sec. 12.3. Process and Negotiation Standards. All requests to amend or renegotiate this Gaming Compact shall be in writing, addressed to the Tribal Chairperson or the Governor, as the case may be, and shall include the activities or circumstances to be negotiated, together with a statement

of the basis supporting the request. If the request meets the requirements of this Section, the parties shall confer promptly and determine a schedule for commencing negotiations within 30 days of the request. Unless expressly provided otherwise herein, all matters involving negotiations or other amendatory processes under Section 4.3.3(b) and this Section 12.0 shall be governed, controlled, and conducted in conformity with the provisions and requirements of IGRA, including those provisions regarding the obligation of the State to negotiate in good faith and the enforcement of that obligation in federal court. The Chairperson of the Tribe and the Governor of the State are hereby authorized to designate the person or agency responsible for conducting the negotiations, and shall execute any documents necessary to do so.

Sec. 12.4. The Tribe shall have the right to terminate this Compact in the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the state Constitution by a California appellate court after the effective date of this Compact, that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe pursuant to a compact) within California.

Sec. 13.0 NOTICES.

Unless otherwise indicated by this Gaming Compact, all notices required or authorized to be served shall be served by first-class mail at the following addresses:

Governor	Tribal Chairperson
State Capitol	Bishop Paiute Tribe
Sacramento,	P.O. Box 548
California 95814	Bishop, California 93515

Sec. 14.0. CHANGES IN IGRA. This Gaming Compact is intended to meet the requirements of IGRA as it reads on the effective date of this Gaming Compact, and when reference is made to the Indian Gaming Regulatory Act or to an implementing regulation thereof, the referenced provision is deemed to have been incorporated into this Compact as if set out in full. Subsequent changes to IGRA that diminish the rights of the State or the Tribe may not be applied retroactively to alter the terms of this Gaming Compact, except to the extent that federal law validly mandates that retroactive application without the State's or the Tribe's respective consent

Sec. 15.0. MISCELLANEOUS.

Sec. 15.1. Third Party Beneficiaries. Except to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms.

Sec. 15.2. Complete agreement; revocation of prior requests to negotiate. This Gaming Compact, together with all addenda and approved amendments, sets forth the full and

complete agreement of the parties and supersedes any prior agreements or understandings with respect to the subject matter hereof.

Sec. 15.3. Construction. Neither the presence in another tribal-state compact of language that is not included in this Compact, nor the absence in this Compact of language that is present in another tribal-state compact shall be a factor in construing the terms of this Compact.

Sec. 15.4. Most Favored Tribe. If, after the effective date of this Compact, the State enters into a Compact with any other tribe that contains more favorable provisions with respect to any provisions of this Compact, the State shall, at the Tribe's request, enter into the preferred compact with the Tribe as a superseding substitute for this Compact; provided that the duration of the substitute compact shall not exceed the duration of this Compact.

Sec. 15.6. Representations.

By entering into this Compact, the Tribe expressly represents that, as of the date of the Tribe's execution of this Compact: (a) the undersigned has the authority to execute this Compact on behalf of his or her tribe and will provide written proof of such authority and ratification of this Compact by the tribal governing body no later than October 9, 1999; (b) the Tribe is (i) recognized as eligible by the Secretary of the Interior for special programs and services provided by the United States to Indians because of their status as Indians, and (ii) recognized by the Secretary of the Interior as possessing powers of self-government. In entering into this Compact, the

State expressly relies upon the foregoing representations by the Tribe, and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact. Failure to provide written proof of authority to execute this Compact or failure to provide written proof of ratification by the Tribe's governing body will give the State the opportunity to declare this Compact null and void.

IN WITNESS WHEREOF, the undersigned sign this Compact on behalf of the State of California and the Bishop Paiute Tribe.

STATE OF CALIFORNIA

_____

By Gray Davis
Governor of the State of California

Executed this 9th day of December, 1999, at Sacramento, California.

BISHOP PAIUTE TRIBE

_____

By Monty Bengochia
Chairperson of the Bishop Paiute Tribe

Executed this 23rd day of September, 1999, at Bishop, California.

ATTEST:

_____

By Bill Jones
Secretary of State, State of California

ADDENDUM "A" TO TRIBAL-STATE GAMING COMPACT BETWEEN THE BISHOP PAIUTE TRIBE AND THE STATE OF CALIFORNIA

Modification No. 1

Section 6.4.4(d) is modified to read as follows:

Section 6.4.4(d) is modified to read as follows:

(d) (1) Notwithstanding subdivision (a), the Tribe may employ or retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if the person is an enrolled member of the Tribe, as defined in this subdivision, and if ~~(i)~~ (A) the person holds a valid and current license issued by the Tribal Gaming Agency that must be renewed at least biennially; ~~(ii)~~ (B) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; and ~~(iii)~~ (C) the person is not an employee or agent of any other gaming operation.

(2) For purposes of this subdivision, "enrolled member" means a person who is either: ~~(a)~~ (A) a person certified by the Tribe as having been a member of the Tribe for at least five (5) years; ~~or (b)~~ (B) a holder of confirmation of membership issued by the Bureau of Indian Affairs; or (C), if the Tribe has 100 or more enrolled members as of the date of execution of this Compact, a person certified by the Tribe as being a member pursuant to criteria and standards specified

in a tribal Constitution that has been approved by the Secretary of the Interior.

Modification No. 2

Section 8.4.1(e) is modified to read as follows:

(e) The Tribe may object to a State Gaming Agency regulation on the ground that it is unnecessary, unduly burdensome, conflicts with a published final regulation of the NIGC, or is unfairly discriminatory, and may seek repeal or amendment of the regulation through the dispute resolution process of Section 9.0; provided that, if the regulation of the State Gaming Agency conflicts with a final published regulation of the NIGC, the NIGC regulation shall govern pending conclusion of the dispute resolution process.

Modification No. 3

Section 12.2 is modified to read as follows:

Sec. 12.2. (a) This Gaming Compact is subject to renegotiation in the event the Tribe wishes to engage in forms of Class III gaming other than those games authorized herein and requests renegotiation for that purpose, provided that no such renegotiation may be sought for 12 months following the effective date of this Gaming Compact.

(b) Nothing herein shall be construed to constitute a waiver of any rights under IGRA in the event of an expansion of the scope of permissible gaming resulting from a change in state law.

Modification No. 4

Section 11.2.1(a) is modified to read:

Sec. 11.2.1. Effective. (a) Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020. No sooner than eighteen (18) months prior to the aforementioned termination date, either party may request the other party to enter into negotiations to extend this Compact or to enter into a new compact. If the parties have not agreed to extend the date of this Compact or entered into a new compact by the termination date, this Compact will automatically be extended to June 30, 2022, unless the parties have agreed to an earlier termination date.

Modification No. 5

Section 12.4 is modified to read as follows:

Sec. 12.4. ~~The Tribe shall have the right to terminate this Compact~~ In the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the state Constitution by a California appellate court after the effective date of this Compact, that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe pursuant to a compact) within California, the Tribe shall have the right to: (i) termination of this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III gaming, or (ii) continue under the

Compact with an entitlement to a reduction of the rates specified in Section 5.1(a) following conclusion of negotiations, to provide for (a) compensation to the State for actual and reasonable costs of regulation, as determined by the state Department of Finance; (b) reasonable payments to local governments impacted by tribal government gaming; (c) grants for programs designed to address gambling addiction; (d) and such assessments as may be permissible at such time under federal law.

Modification No. 6

Section 10.2(d) is modified to read as follows:

(d) Carry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and ~~that~~ the Tribe shall request its insurer to ~~provide reasonable assurance that those claims will be~~ promptly and fairly ~~adjudicated, and that legitimate claims will be paid~~ settle all valid claims; provided that nothing herein requires the Tribe to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees. On or before the effective date of this Compact or not less than 30 days prior to the commencement of Gaming Activities under this Compact, whichever is later, the Tribe shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person or property at the Gaming Facility or in connection with the Tribe's Gaming Operation, including procedures for processing any claims for such money

damages; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above.

Modification No. 7

Section 10.2(k) is modified to read as follows:

(k) Comply with provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. Sec. 5311-5314, as amended, and all reporting requirements of the Internal Revenue Service, insofar as such provisions and reporting requirements are applicable to casinos.

IN WITNESS WHEREOF, the undersigned sign this Compact on behalf of the State of California and the Bishop Paiute Tribe.

STATE OF CALIFORNIA

_____

By Gray Davis
Governor of the State of California

Executed this 9th day of December, 1999, at Sacramento, California.

BISHOP PAIUTE TRIBE

_____

By Monty Bengochia
Chairperson of the Bishop Paiute Tribe

Executed this 23rd day of September, 1999, at Bishop, California.

ATTEST:

_____

By Bill Jones
Secretary of State, State of California

ADDENDUM "B" TO TRIBAL-STATE GAMING COMPACT BETWEEN THE BISHOP PAIUTE TRIBE AND THE STATE OF CALIFORNIA

In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than October 12, 1999. If such notice has not been received by the State by October 13, 1999, this Compact shall be null and void. Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact. No amendment of the Ordinance shall be effective unless approved by the State.

Attachment: Model Tribal Labor Relations Ordinance.

IN WITNESS WHEREOF, the undersigned sign this Compact on behalf of the State of California and the Bishop Paiute Tribe.

STATE OF CALIFORNIA

_____

By Gray Davis
Governor of the State of California

Executed this 9th day of December, 1999, at Sacramento, California.

BISHOP PAIUTE TRIBE

_____

By Monty Bengochia
Chairperson of the Bishop Paiute Tribe

Executed this 23rd day of September, 1999, at Bishop, California.

ATTEST:

_____

By Bill Jones
Secretary of State, State of California

BISHOP TRIBAL COUNCIL

ORDINANCE T99-01

AN ORDINANCE OF THE BISHOP TRIBAL COUNCIL ADOPTING A TRIBAL LABOR RELATIONS ORDINANCE

The Bishop Tribal Council, acting as the governing body for the Bishop Paiute Tribe and pursuant to its authority thereto adopts the Tribal Labor Relations Ordinance, dated September 14, 1999 as mandated by the State of California as a pre-condition to the State of California signing a Class III Tribal/State Compact.

The Tribal Labor Relations Ordinance is attached hereto and incorporated within this ordinance.

It is expressly stated and the intent of this Ordinance is that it shall not become effective (Tribal Labor Relations Ordinance) until the threshold of applicability provisions of Section 1 are triggered.

The foregoing Ordinance NO. T99-01 was passed and adopted this 11th day of October, 1999 by the following vote:
YES 4 NO 0 ABSENT 0

ATTEST

_____ October 11th, 1999
Monty Bengochia, Chairman Date

_____ October 11th, 1999
Secretary Date

PAIUTE PROFESSIONAL BUILDING - 50 TU SU LANE
- BISHOP, CA 93514
PHONE (760) 873-3584 FAX (760) 873-4143
E-Mail mervin@telis.org

ATTACHMENT TO
ADDENDUM B

TRIBAL LABOR RELATIONS ORDINANCE

September 14, 1999

Section 1: Threshold of applicability

(a) Any tribe with 250 or more persons employed in a tribal casino and related facility shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to a tribal-state compact. A "related facility" is one for which the only significant purpose is to facilitate patronage of the class III gaming operations.

(b) Any tribe which does not operate such a tribal casino as of September 10, 1999, but which subsequently opens a tribal casino, may delay adoption of this ordinance until one year from the date the number of employees in the tribal casino or related facility as defined in 1(a) above exceeds 250.

(c) Upon the request of a labor union, the Tribal Gaming Commission shall certify the number of employees in a tribal casino or other related facility as defined in 1(a) above. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel.

Section 2: Definition of Eligible Employees

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which Class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the Class III gaming operations, except for any of the following:

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(2) any employee of the Tribal Gaming Commission;

(3) any employee of the security or surveillance department, other than those who are responsible for the technical repair and maintenance of equipment;

(4) any cash operations employee who is a "cage" employee or money counter; or

(5) any dealer.

Section 3: Non-interference with regulatory or security activities

Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance. Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the tribe's gaming operations. The Tribal Gaming Commission is specifically excluded from the definition of tribe and its agents.

Section 4: Eligible Employees free to engage in or refrain from concerted activity

Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 5: Unfair Labor Practices for the tribe

It shall be an unfair labor practice for the tribe and/or employer or their agents:

(1) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the tribe and/or employer and a certified union from agreeing to union security or dues checkoff;

(3) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance;

(4) to refuse to bargain collectively with the representatives of Eligible Employees.

Section 6: Unfair Labor Practices for the union

It shall be an unfair labor practice for a labor organization or its agents:

(1) to interfere, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a primary or secondary boycott or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce or other terms and conditions of employment. This section does not apply to section 11;

(3) to force or require the tribe and/or employer to recognize or bargain with a particular labor organization as the representative of Eligible Employees if another labor organization has been certified as the representative of such Eligible Employees under the provisions of this TLRO;

(4) to refuse to bargain collectively with the tribe and/or employer, provided it is the representative of Eligible Employees subject to the provisions herein;

(5) to attempt to influence the outcome of a tribal governmental election, provided, however, that this section does not apply to tribal members.

Section 7: Tribe and union right to free speech

The tribe's and union's expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint or coercion if such expression contains no threat of reprisal or force or promise of benefit.

Section 8: Access to Eligible Employees

(a) Access shall be granted to the union for the purposes of organizing Eligible Employees, provided that such organizing activity shall not interfere with patronage of the casino or related facility or with the normal work routine of the Eligible Employees and shall be done on non-work time in non-work areas that are designated as employee break rooms or locker rooms that are not open to the public. The

tribe may require the union and or union organizers to be subject to the same licensing rules applied to individuals or entities with similar levels of access to the casino or related facility, provided that such licensing shall not be unreasonable, discriminatory, or designed to impede access.

(b) The Tribe, in its discretion, may also designate additional voluntary access to the Union in such areas as employee parking lots and non-Casino facilities located on tribal lands.

(c) In determining whether organizing activities potentially interfere with normal tribal work routines, the union's activities shall not be permitted if the Tribal Labor Panel determines that they compromise the operation of the casino:

(1) security and surveillance systems throughout the casino, and reservation;

(2) access limitations designed to ensure security;

(3) internal controls designed to ensure security;

(4) other systems designed to protect the integrity of the tribe's gaming operations, tribal property and/or safety of casino personnel, patrons, employees or tribal members, residents, guests or invitees.

(d) The tribe shall provide to the union, upon a thirty percent (30%) showing of interest to the Tribal Labor Panel, an election eligibility list containing the full first and last

name of the Eligible Employees within the sought after bargaining unit and the Eligible Employees' last known address within ten (10) working days. Nothing herein shall preclude a tribe from voluntarily providing an election eligibility list at an earlier point of a union organizing campaign.

(e) The tribe agrees to facilitate the dissemination of information from the union to Eligible Employees at the tribal casino by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where the tribe already posts announcements pertaining to Eligible Employees. Actual posting of such posters, notices, and other materials, shall be by employees desiring to post such materials.

Section 9: Indian preference explicitly permitted

Nothing herein shall preclude the tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the tribe's right to follow tribal law, ordinances, personnel policies or the tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention. Moreover, in the event of a conflict between tribal law, tribal ordinance or the tribe's customs and traditions regarding Indian preference and this Ordinance, the tribal law, tribal ordinance or the tribe's customs and traditions shall govern.

Section 10: Secret ballot elections required

(a) Dated and signed authorized cards from thirty percent (30%) or more of the Eligible Employees within the bargaining unit verified by the elections officer will result in a secret ballot election to be held within 30 days from presentation to the elections officer.

(b) The election shall be conducted by the election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning representation of the tribe and/or Employer's Eligible Employees by a labor organization shall be resolved by the election officer. The election officer shall be chosen upon notification by the labor organization to the tribe of its intention to present authorization cards, and the same election officer shall preside thereafter for all proceedings under the request for recognition; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall certify the labor organization as the exclusive collective bargaining representative of a unit of employees if the labor organization has received the majority of votes by employees voting in a secret ballot election that the election officer determines to have been conducted fairly. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or union, the election officer may

order a re-run election. If the election officer determines that there was the commission of serious Unfair Labor Practices by the tribe that interfere with the election process and preclude the holding of a fair election, and the labor organization is able to demonstrate that it had the support of a majority of the employees in the unit at any point before or during the course of the tribe's misconduct, the election officer shall certify the labor organization.

(d) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

(e) A union which loses an election and has exhausted all dispute remedies related to the election may not invoke any provisions of this labor ordinance at that particular casino or related facility until one year after the election was lost.

Section 11: Collective bargaining impasse

Upon recognition, the tribe and the union will negotiate in good faith for a collective bargaining agreement covering bargaining unit employees represented by the union. If collective bargaining negotiations result in impasse, and the matter has not been resolved by the tribal forum procedures sets forth in Section 13 (b) governing resolution of impasse within sixty (60) working days or such other time as mutually agreed to by the parties, the union shall have the right to strike. Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. Sec. 2703 (4).

Section 12: Decertification of bargaining agent

(a) The filing of a petition signed by thirty percent (30%) or more of the Eligible Employees in a bargaining unit seeking the decertification of a certified union, will result in a secret ballot election to be held 30 days from the presentation of the petition.

(b) The election shall be conducted by an election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning the decertification of the labor organization shall be resolved by an election officer. The election officer shall be chosen upon notification to the tribe and the union of the intent of the employees to present a decertification petition, and the same election officer shall preside thereafter for all proceedings under the request for decertification; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall order the labor organization decertified as the exclusive collective bargaining representative if a majority of the employees voting in a secret ballot election that the election officer determines to have been conducted fairly vote to decertify the labor organization. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or the union the election officer may order a re-run election or dismiss the decertification petition.

(d) A decertification proceeding may not begin until one (1) year after the certification of a labor union if there is no collective bargaining agreement. Where there is a collective bargaining agreement, a decertification petition may only be filed no more than 90 days and no less than 60 days prior to the expiration of a collective bargaining agreement. A decertification petition may be filed anytime after the expiration of a collective bargaining agreement.

(e) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

Section 13: Binding dispute resolution mechanism

(a) All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining negotiation impasse, which shall only go through the first level of binding dispute resolution.

(b) The first level of binding dispute resolution for all matters related to organizing, election procedures, alleged unfair labor practices, and discharge of Eligible Employees shall be an appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board. The parties agree to pursue in good faith the expeditious resolution of these matters within strict time limits. The time limits may not be extended without the agreement of both parties. In the absence of a mutually satisfactory resolution, either party may

proceed to the independent binding dispute resolution set forth below. The agreed upon time limits are set forth as follows:

(1) All matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees, shall be resolved by the designated tribal forum within thirty (30) working days.

(2) All matters after the union has become certified as the collective bargaining representative and relate specifically to impasse during negotiations, shall be resolved by the designated tribal forum within sixty (60) working days;

(c) The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Tribal Labor Relations Ordinance.

(1) Each member of the Tribal Labor Panel shall have relevant experience in federal labor law and/or federal Indian law with preference given to those with experience in both. Names of individuals may be provided by such sources as, but not limited to, Indian Dispute Services, Federal Mediation and

Conciliation Service, and the American Academy of Arbitrators.

(2) Unless either party objects, one arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance. If either party objects, the dispute will be decided by a three-member panel of the Tribal Labor Panel, which will render a binding decision. In the event there is one arbitrator, five (5) Tribal Labor Panel names shall be submitted to the parties and each party may strike no more that two (2) names. In the event there is a three (3) member panel, seven (7) TLP names shall be submitted to the parties and each party may strike no more than two (2) names. A coin toss shall determine which party may strike the first name. The arbitrator will generally follow the American Arbitration Association's procedural rules relating to labor dispute resolution. The arbitrator or panel must render a written, binding decision that complies in all respects with the provisions of this Ordinance.

(d) Under the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court. In the event the federal court declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to the Ordinance in the appropriate state superior court. The parties are free to put at

issue whether or not the arbitration award exceeds the authority of the Tribal Labor Panel.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BISHOP PAIUTE TRIBE in its official capacity and as a representative of its Tribal members and BISHOP PAIUTE GAMING CORPORATION DBA the PAIUTE PALACE CASINO Plaintiffs,	)
vs.	)
COUNTY OF INYO, PHILLIP MCDOWELL, individually and in his official capacity as District Attorney of Inyo County; DANIEL LUCAS, individually and in his official capacity of Sheriff of the County of Inyo Defendants	)

Case No.:

COMPLAINT FOR:

1. DECLARATORY RELIEF

2. INJUNCTIVE RELIEF

3. VIOLATION OF CIVIL RIGHTS UNDER THE UNITED STATES CONSTITUTION - DAMAGES AND ATTORNEY FEES

4. SUPPLEMENTAL JURISDICTION PURSUANT TO 28 U.S.C. §1267(a); VIOLATION OF THE CONSTITUTION OF THE STATE OF CALIFORNIA

DEMAND FOR JURY TRIAL

JURISDICTION

1. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1337, 1343(i)(3)(4) in that Plaintiff's claims arise under federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes, and the states and presents federal questions related to the limitations of jurisdiction by states over federally recognized Indian tribes pursuant to Article I, Section 8 of the United States Constitution, 18 U.S.C. §1162 (hereinafter referred to as "Public Law 280"), as well as under 25 U.S.C. §2701, *et seq.* (Indian Gaming Regulatory Act of 1988, hereinafter referred to as "IGRA"), an Act of Congress regulating commerce between the States and the Indian Tribes, and plaintiffs are Indian Tribes and tribally-owned businesses organized under the laws of the Bishop Paiute Tribe (Tribe); and 42 U.S.C. §§1983 and 1988, in that Defendants are alleged to have acted under color of the laws of the State of California to deprive Plaintiffs and the members of the Tribe of rights secured under the Constitution and laws of the United States. This Court also has jurisdiction to hear supplemental matters concerning alleged violations of the laws of the State of California pursuant to 28 U.S.C. §1267(a).

VENUE

2. Venue is in this District under 29 U.S.C. §1391(b) and 1392 in that all Defendants reside or maintain their respective principal place of business in Inyo County, the acts of which this complaint is made occurred within Inyo County, the

personal property which is the subject of this action is located in Inyo County, and Plaintiffs reside in Inyo County.

PARTIES

3. Plaintiffs the Bishop Paiute Gaming Corporation DBA the Paiute Palace Casino (Casino), a tribally owned casino operated under the Bishop Paiute Gaming Corporation, a political subdivision of Plaintiff Bishop Paiute Tribe. The Bishop Paiute Tribe is a federally recognized Indian Tribe and is an "Indian Tribe" within the meaning of IGRA, 25 U.S.C. §2703(5).

4. Defendant Daniel Lucas (hereinafter "Lucas") is the duly-elected Sheriff of the County of Inyo, California, and is sued in both his individual and official capacity. At all times relevant hereto, Defendant Lucas was and remains the chief law enforcement office of Defendant Inyo County, and as such is responsible for the promulgation and implementation of the policies and procedures by which the peace is kept in the County of Inyo, including determining whether, under what circumstances, when and how the County of Inyo will enforce the laws of the State of California and the County of Inyo on Indian Reservations within said County, and determining the jurisdictional limitations the County of Inyo in its implementation of the laws of the State of California and the County of Inyo on Indian Reservations within said County, and for authorizing and supervising the enforcement of said laws on said Reservations by Inyo County Sheriff's deputies and other persons acting in concert with them or under their direction or control.

5. Defendant Phillip McDowell (hereinafter "McDowell") is the duly-elected District Attorney of the County of Inyo, and is sued both in his individual and official capacity. As District Attorney, Defendant McDowell is responsible for the promulgation and implementation of the policies and procedures by which criminal investigations and prosecutions are initiated in the courts of the State of California against persons charged with violating the laws of the State and the County of Inyo, for determining the limitations of the County's jurisdiction as it relates to the commencement of investigations and prosecutions of State and County-defined offenses which occur on federal-tribal lands, and for authorizing and supervising the initiation and maintenance of prosecutions for violations of said laws.

GENERAL ALLEGATIONS

6. The Bishop Paiute Tribe is a federally recognized Tribe and is the beneficial owner of and exercises jurisdiction over the Bishop Paiute Reservation, which is located within the State of California.[1] Title to the lands comprising the Reservation is held in trust for the Tribe by the United States of America, and constitutes both "Indian lands" within the meaning of 25 U.S.C. §2703(4) and "Indian country" within the meaning of 18 U.S.C. §§1162, 1166.

7. Historically, the federal government possesses plenary and exclusive power to deal with Indian Tribes to regulate and

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[1] Also known as the Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California

protect Indians and their property against interferences, including interferences by state governments.

8. The Bishop Paiute Tribe possesses sovereign immunity, which cannot be waived except by the Tribe itself or by Congress, and such a waiver must be express and unequivocal. The sovereign immunity of the Bishop Paiute Tribe is also shared by the Bishop Paiute Gaming Corporation, as a political subdivision of the Tribe.

9. 18 U.S.C. §1162 (hereinafter referred to as "Public Law 280") passed by Congress in 1953 provides in part that "Each of the States. . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State. . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State. . .". The State of California is one of the states identified within P.L. 280 as being delegated jurisdiction over offenses committed by or against Indians within Indian country.10. The transfer of civil jurisdiction to state governments pursuant to 28 U.S.C. §1360, also known as P.L. 280, uses language that is virtually identical to 16 U.S.C. §1162. 28 USC Section §1360 provides in part that: "Each of the states listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the state to the same extent that such state has jurisdiction over other civil causes of action, and those civil laws of such state that are of general application to private persons or

private property shall have the same force and effect within such Indian country as they have elsewhere within the state." The State of California is one of the states identified within P.L. 280 as being delegated jurisdiction over civil matters which occur by or against Indians within Indian country.

11. The primary concern of Congress behind the passage of P.L. 280 (18 USC §1162) was to address the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement. Notably absent from P.L. 280 is any conferral of state jurisdiction over Indian tribes themselves. P.L. 280 does not include a waiver of tribal sovereign immunity.

12. P.L. 280 has never been interpreted as giving jurisdiction over tribal governments to states and their political subdivisions to enforce state laws against tribal governments.

13. Historically, state jurisdiction over reservations has been strongly disfavored in order to protect Indian sovereignty from state interference. Established principles of statutory construction require the starting point of any analysis is not the assumption that the state has jurisdiction, but rather that the state is without jurisdiction over the reservation.

14. Any ambiguities in statutory sections should be resolved in favor of the Indians and, thus, against the authority of the state to exercise jurisdiction.

15. In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*, providing a statutory basis for Indian tribes to engage in gaming as a

means of promoting tribal economic development, self-sufficiency and strong tribal governments. IGRA specifies that the only role the State may play in the Tribe's gaming operation is pursuant to a tribal-state compact. Pertinent provisions of 25 U.S.C. §2710(d)(3)(C) state that a compact may include provisions related to: the application of criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activities; the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; and any other subjects that are directly related to the operation of gaming activities.

16. The Bishop Paiute Tribe executed a Tribal/State compact on September 23, 1999 with the State of California. Contained within the Preamble to the compact: "The State enters into this Compact out of respect for the sovereignty of the Tribe; . . .to initiate a new era of tribal-state cooperation in areas of mutual concern..." The compact became effective upon approval by the Secretary of the Interior and publication in the Federal Register, which occurred on May 16, 2000. Access by State officials to tribal records related to the Plaintiff's tribal casino must be negotiated for on a government-to-government basis between the State of California and the Bishop Paiute Tribe. At the time of the initial search and seizure referred to hereinafter, no agreement between the State and the Tribe regarding the scope of the State's jurisdiction to obtain access to the Tribe's records related to the casino was in effect. The scope of access to tribal records the State negotiated for is memorialized in Section 7.4.3 of the Tribal/State Compact, which provides the State limited access to the Tribe's Gaming Operation or

Facility records. State access to tribal records is limited . Only those records needed to ensure that the Tribe is in compliance with the terms of the compact, and nothing more are available.

17. Shortly after February 14, 2000, personnel for the Paiute Palace Casino received a request for records for three casino employees, all tribal members, from the Inyo County District Attorney's Office. The stated purpose of the request was to conduct an investigation into potential welfare fraud. The correspondence containing the request was forwarded to the Tribe's attorney, who responded in writing on behalf of the Tribe on February 28, 2000. The correspondence apprised Defendant's that it is Plaintiff's long standing custom, practice and policy that the information requested would not be provided unless the Tribe was authorized to do so in writing by the employees whose records were being sought.

18. On March 23, 2000, a search warrant was obtained by officials of the District Attorney's Office for the County of Inyo.

19. The search warrant stated that the only records that were to be obtained were "Payroll records for Patricia Dewey, date of birth 9-20-59. . . ; Clifford Dewey, date of birth 11-27-54 . . . ; and Tinya Hill, date of birth 2-23-79 . . . for the period of April 1998 through June 1998." All three individuals are members of the Bishop Paiute Tribe.

20. On March 23, 2000, Anita Sonke, an employee of the Paiute Palace Casino received a telephone call from Leslie Nixon (Nixon), District Attorney fraud investigator for the

County of Inyo, asking if she would be in the office that afternoon. Ms. Sonke replied that she would. Ms. Sonke was never apprised by Defendant Nixon that the District Attorney intended to execute a search warrant to obtain confidential personnel records.

21. On March 23, 2000, the search warrant was executed upon the Paiute Palace Casino by the District Attorneys Office with the assistance of the Sheriffs Department for the County of Inyo by the use of force and intimidation. Deadbolt cutters were used to cut the locks off of the storage facility where the confidential personnel records were stored. Defendants did not limit their seizure to the records of those individuals identified within the search warrant, but additionally seized the confidential personnel records of seventy-eight employees who were not subject to criminal investigation. Tribal personnel were not given the opportunity to redact from the seized documents confidential information pertaining to individuals not identified by the terms and limitations of the search warrant. Tribal personnel repeatedly advised Defendants that they did not have jurisdiction to execute search warrants upon sovereign tribal governments, with Defendants refusing to abate their search and seizure of tribal documents.

22. Subsequent to July 13, 2000, the attorney for the Bishop Paiute Tribe, received correspondence from Defendant McDowell, indicating that the County of Inyo wished to obtain the personnel records for six additional Casino employees for the period of July 1999 through the present. All individuals identified again were members of the Bishop Paiute Tribe.

23. Plaintiffs allege, based upon information and belief, that the investigations conducted by the District Attorney's Office are random in nature. There was no probable cause to believe that any of the individuals being investigated have in fact committed any type of welfare fraud. That is, the District Attorney's Office is merely checking with the State Franchise Tax Board to match California State welfare recipients with income reported by employers. Plaintiff's employ and have employed such classes of individuals.

24. Plaintiffs' allege, based upon information and belief, that the County of Inyo has within their policies and guidelines less intrusive means of investigating instances of potential welfare fraud, such as initiating administrative proceedings whereby individual recipients of welfare benefits shall be required to dispute allegations of unlawful receipt of said welfare benefits.

25. Plaintiffs allege, based upon information and belief, that all Defendants have failed to maintain an adequate policy and training program whereby Defendant's are fully informed of the limitations and scope of their jurisdiction as it relates to addressing matters concerning sovereign tribal governments.

FIRST CLAIM FOR RELIEF DECLATORY RELIEF AGAINST ALL DEFENDANTS

26. Plaintiffs re-allege each of the allegations set forth in Paragraphs 1 through 25 above, and by this reference incorporates each of the allegations herein as if set forth in full.

27. Public Law 280 cannot be interpreted in a manner that provides the State of California and its political subdivisions as having the ability to exert criminal jurisdiction over the Bishop Paiute Tribe in the manner in which the County of Inyo has acted. The Bishop Paiute Tribe was not alleged to have violated the laws of the State of California, is not the subject of criminal investigation for any violation of the laws of the State of California, and as such Public Law 280 is inapplicable under these circumstances.

28. An actual controversy exists between Plaintiffs and Defendants in that Plaintiffs contends that Defendants lack any jurisdiction whatsoever to apply or enforce California laws regarding search and seizure of documents pertaining to criminal investigations against the Bishop Paiute Tribe and its political subdivisions. More specifically, Plaintiffs contends that PL 280 does not confer state criminal jurisdiction over Tribal employee records belonging to and under the control of the Bishop Paiute Tribe when the investigation involves past and/or present employees of the Tribe's wholly-owned gaming facility. Defendants, on the other hand, have embraced a policy that Public Law 280 gives Defendants jurisdiction over sovereign tribal governments to execute search warrants in the manner described herein. Such an interpretation acts as an infringement upon the Bishop Paiute Tribe's right to remain free from state interference with the Tribe's right to self-governance as proscribed by federal law.

SECOND CLAIM FOR RELIF DECLARATORY RELIEF AGAINST ALL DEFENDANTS

28. Plaintiffs re-alleges each of the allegations set forth in Paragraphs 1 through 27 above, and by this reference incorporates each such allegation herein as if set forth in full.

29. In the alternative, Plaintiffs allege that the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq*., preempts whatever jurisdiction the State of California otherwise might have to directly apply and enforce California's laws against Plaintiffs, their officers, agents, employees, contractors and patrons in any manner within the Paiute Palace Casino.

30. The Tribal/State Compact, which was executed on September 23, 1999, expressly limited the State's access to Tribal records. Access was only to ensure that the Tribe is in compliance with the terms of the compact, and nothing more.

31. Without a Tribal/State Compact in place, the State would have no rightful access to Plaintiffs' Casino records. With a Tribal/State Compact in place, the State's access to Plaintiff's Casino records is expressly limited to the terms negotiated for pursuant to a Tribal/State compact.

32. An actual controversy exists between Plaintiffs and Defendants in that Plaintiffs contend that Defendants lack any jurisdiction whatsoever to apply or enforce California's laws regarding search and seizure of documents pertaining to criminal investigation against the Plaintiffs themselves, and that any jurisdiction to access Plaintiff's casino records must be negotiated for pursuant to a Tribal/State Compact. Defendants have embraced a policy that they possess such

jurisdiction under Public Law 280, and such jurisdiction has not been preempted by IGRA and thus they possess jurisdiction to directly enforce the laws of this state related to search and seizure of documents directly upon sovereign tribal governments such as Plaintiffs'.

THIRD CLAIM FOR RELIEF VIOLATION OF CIVIL RIGHTS AGAINST ALL DEFENDANTS— 42 U.S.C. §1983

33. Plaintiffs re-allege each of the allegations set forth in Paragraphs 1 through 32 above, and by this reference incorporates each such allegation herein as if set forth in full.

34. Plaintiffs are informed and believes, and upon that basis allege that in taking the actions of which this complaint is made herein, Defendant McDowell acted consistently with the policies of Defendant County and on behalf of Defendant County in his capacity as County District Attorney, and formulator and executor of said County's policies and procedures, and personally knew of, and in bad faith approved and directed the above-described seizure of Plaintiffs' confidential casino personnel records from the casino.

35. Plaintiffs are informed and believe, and upon that basis alleges that, when Defendant McDowell applied to the Superior Court for a warrant to search the premises of the Plaintiffs' casino, he had no reasonable basis upon which to believe that he had jurisdiction to execute such a warrant pursuant to Public Law 280 or any other state or federal law.

36. Plaintiffs are informed and believes, and upon that basis allege that Defendant McDowell acted under color of the laws of the State of California in obtaining from the Superior Court Search Warrant No. 427, and that but for Defendant McDowell's (bad faith) actions, said Superior Court would not have issued said search warrant, and thus Plaintiffs would not have sustained the damage which resulted from the execution of that warrant by Defendants County of Inyo through Defendants McDowell, Lucas, Christianson, Nixon, Doe Defendants 1-50 and others acting in concert with them.

37. In the alternative, if it is not the custom, habit or policy of Defendant's County, District Attorney and Sheriff to act in the manner described above, then the single decision to execute the search warrant upon Plaintiffs, that the decision to execute a search warrant in this situation was made by Defendants McDowell and Lucas, who are an officials who possess with authority to render a final decision to act in the manner described above.

38. Each of the defendants, individually and in concert with the others, acted under pretense and color of law and in their official capacity, but said acts were beyond the scope and jurisdiction and without authorization of law and in abuse of their powers, and each defendant acted willfully, knowingly, and with specific intent to deprive the Tribe of rights secured by Plaintiff's by the Fourth and Fourteenths Amendmentss to the Constitution of the United States, and by 42 U.S.C. §1983, as well as Article I, §8, Cl. 3 of the Constitution of the United States, and IGRA.

39. As a direct and proximate result of the acts of Defendants County of Inyo through Defendants McDowell

and Lucas, Plaintiffs have suffered an injury in fact, including destruction of tribal property, i.e. locks, which were cut off by the use of deadbolts. Additionally, injury to Tribe's right to self-governance has been violated as a direct result of Defendant's assertion of jurisdiction in a manner, which is contrary to federal law and policies.

FOURTH CLAIM FOR RELIEF
INJUNCTIVE RELIEF

40. Plaintiff's re-allege each of the allegations set forth in Paragraphs 1 through 39 above, and by this reference incorporates each such allegation herein as if set forth in full.

41. Unless restrained and enjoined by this Court, Defendants, their deputies and subordinates and persons working in concert with them will continue to act in excess of their jurisdiction and in derogation of federal laws and Plaintiffs' sovereignty and right to self governance which will inflict upon Plaintiffs and its members severe and irreparable injury for which there is no adequate remedy at law.

42. As stated above, Defendants have, according to their July 2000 notification, put Plaintiffs on notice that Defendants are seeking additional personnel records from Plaintiffs, all under threat of duplicating their prior procedures of executing a search warrant by way of the use of threats of force and intimidation and actually obtaining personnel records belonging to and in the possession of an independent Tribal sovereign, if not enjoined by this court.

FIFTH CLAIM FOR RELIEF
DECLARATORY RELIEF
SUPPLEMENTAL JURISDICTION PURSUANT TO 28 U.S.C. §1367(a)
VIOLATION OF THE CONSTITUTION OF THE STATE OF CALIFORNIA

43. Plaintiffs re-allege against all Defendants each of the allegations set forth in Paragraphs 1 through 42 above, and by this reference incorporate each such allegation herein as if set forth in full.

44. 28 U.S.C. §1367(a) provides this Court supplemental jurisdiction to rule on matters related to state law when those claims are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Plaintiffs allege that this claims is so interrelated that in the interest of justice, this Court should accept jurisdiction to hear this matter which requires an interpretation of the laws of the State of California.

45. In 1953, when Congress contemplated the passage of P.L. 280, a review of the six enumerated states laws and constitutions was conducted to determine if each state's laws expressly precluded those states from assuming jurisdiction over offenses and incidents that occurred on Indian lands between and Indians and non-Indians. California's laws and constitution did not expressly prohibit assumption of jurisdiction in the manner proscribed by P.L.280. However, the State of California had never in the past had jurisdiction over offenses that occurred on Indian lands between Indians and non-Indians, and as such P.L. 280 mandated assumption

of jurisdiction by the State of California in a manner that had never been assumed before by the State of California.

46. The powers of the California state government are legislative, executive and judicial. Persons charged with the exercise of one power under one branch of government may not exercise power under either of the other branches of government, except as permitted by the Constitution. Judicial interpretation of this mandate proscribed within Cal. Const. Art. III, §3 has concluded that it is within the province of the Legislative branch of the State of California to establish the policies of this state with the passage of laws, while it is the responsibility of the Executive branch to see to it that those laws are faithfully executed. It is the responsibility of the Judicial branch to interpret those laws.

47. The assumption or expansion of jurisdiction is a policy decision, which must be made by the Legislature. The fundamental act of establishing policy cannot be performed by the Executive or Judicial branches, unless delegated to those branches with safeguards built in by the Legislature to prevent an abuse of powers. This concept is basic to the principle of separation of powers. The purpose of this doctrine is to assure that truly fundamental issues will be resolved by the Legislature.

48. The Constitution of the State of California is silent on the issue of expanding civil and criminal jurisdiction into lands held in trust by the federal government by the Executive and Judicial branches of California government. When a state's constitution is silent on a particular issue the legislature should the body of the state government to address the issue.

The Legislature has never addressed if and how the State of California should accept jurisdiction as described by P.L.280.

49. Penal Code 830.1 defines the territorial limits of the State's jurisdiction. These territorial limits do not include "Indian country." The laws of the State of California have never been amended to expand the territorial limits of the State's jurisdiction to include jurisdiction over Indian lands. As such, law enforcement official's jurisdiction has never been expanded pursuant to state law to include jurisdiction over Indian lands. Such an affirmative expansion of jurisdiction must be performed by the policy making branch of the government of the State of California: the Legislature.

50. Judicial jurisdiction may be absent if the criminal act or omission took place outside the territorial boundaries of the state. If the criminal statute itself purported to apply extraterritorially it would be void for lack of legislative jurisdiction; and if the court attempts to apply a valid statute to extraterritorial activities beyond the power of the state to control, it is acting without judicial jurisdiction. This fundamental common law and constitutional principle limited state power to its boundaries has many applications in the civil law and in the criminal law.

51. Without affirmative actions taken by the policy making body of the State of California, i.e. the Legislative branch of government, the assumption of jurisdiction by the Executive and Judicial branches are without foundation in the laws of the State of California. As such, the acts of the Executive and Judicial branches of the government of the State of California as it relates to the application of P.L. 280 are in violation of Cal. Const. Art. III, §3, and as such their acts are void and

without legal effect, unless and until the California Legislature clearly establishes the policy as to how the State of California shall accept jurisdiction pursuant to P.L. 280, and alternatively delegates to the Executive and Judicial branches the authority to establish certain policies, building in procedural safeguards to ensure that such a delegation of power is not abused.

52. The Tenth Amendment of the Constitution of the United States precludes Congress from imposing such obligations and responsibilities on states. Accordingly, Public Law 280 is defective under the Tenth Amendment of the Constitution of the United States.

53. An actual controversy exists between Plaintiffs and Defendants in that Plaintiffs contend that Defendants lack any jurisdiction whatsoever to apply or enforce Public Law 280, unless and until the California Legislature affirmatively acts and clearly accepts jurisdiction, and clearly defines the scope and boundaries of the authority of the Executive and Judicial branches of the State's government as it relates to the assertion of state laws on tribal lands. Defendants contend that they possess such jurisdiction under Public Law 280 to act in the manner that they have to date and in the future, and thus they possess jurisdiction to directly enforce the laws of this state related to search and seizure directly upon sovereign tribal governments.

WHEREFORE, Plaintiffs pray as follows:

Pursuant to its First Claim for Relief:

1. That the Court enter judgment in favor of Plaintiffs and against Defendants, declaring that Public Law 280 does not give States and their political subdivisions authority to exert jurisdiction over tribal governments in the manner described herein. Specifically, P.L. 280 does not confer state criminal jurisdiction over tribal employee records, which belong to and are under the complete control of the Bishop Paiute Tribe or its Tribally-owned casino.

2. That the Court enter judgment in favor of Plaintiffs and against Defendants, declaring that Defendant's actions exceeded the scope of authority provided for by Public Law 280, and as such Defendant's actions violated federal laws and the Plaintiffs' right to remain free from state interference with the Plaintiffs' right to self-governance.

Pursuant to the Second Claim for Relief:

3. That in the alternative, the Court enter judgment in favor of Plaintiffs and against Defendants declaring that any jurisdiction Defendants otherwise might have had to enforce the laws of the State of California on Plaintiffs, their officers, agents, employees, contractors and patrons in any manner within the Paiute Palace Casino has been preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §2701, et seq. That the only access a State may have to the records of a tribal casino must be negotiated for pursuant to a tribal-state compact.

4. That the Court enter judgment in favor of Plaintiffs and against Defendants declaring that at the time of the initial seizure of the Plaintiffs' confidential personnel records related to the Tribe's casino employees, no Tribal/State Compact was in effect. As such, Defendants had no authority to access Plaintiffs' casino records, and the actions of Defendants were unlawful and violative of Plaintiff's rights under IGRA to engage in gaming without interference, except as provided within a tribal-state compact.

5. That the Court enter judgment in favor of Plaintiffs and against Defendants declaring that the tribal-state compact negotiated between the Plaintiff and the State of California provides only the State of California limited access to tribal casino records only to ensure that Plaintiff is in compliance with the terms of the Tribal/State Compact, and nothing more. As such, Defendants do not have the authority to assert jurisdiction over the Plaintiff's casino records in the manner in which they allege they have authority.

Pursuant to its Third Claim for Relief:

6. Compensatory damages

7. That the Court award Plaintiffs reasonable attorneys' fees, costs and expenses pursuant to 42 USC §1988

8. Such other and further relief as appears reasonable and just

Pursuant to its Fourth Claim for Relief:

9. That the Court enter judgment in favor of Plaintiffs and against Defendants temporarily, preliminarily and permanently enjoining and restraining defendants and all persons working in concert with them or under their direction and control from enforcing or attempting to enforce the laws of the State of California and or the County of Inyo on Plaintiffs as it relates to the seizure of Tribally-owned documents.

10. That the Court enter judgment in favor of Plaintiffs and against Defendants temporarily, preliminarily and permanently enjoining and restraining defendants and all persons working in concert with them or under their direction and control from destroying or refusing to return to Plaintiff all tribally-owned documents which were seized from the premises of the Plaintiff's tribal casino on or about March 23, 2000.

Pursuant to the Fifth Claim for Relief:

11. That the Court enter judgment in favor of Plaintiffs and against Defendants declaring that unless and until the California Legislature expressly assumes criminal and civil jurisdiction over incidents that occur on tribal lands between Indians and non-Indians, Public Law 280 shall have no force and effect, and that any actions taken by the Executive and Judicial Branches of the government of the State of California, pursuant to Public Law 280, shall violate the separation of powers clause, Article III, §3 of the California Constitution.

12. Alternatively, that the court enter a judgment in favor of Plaintiffs and against Defendants declaring that Public Law is in violation of the Tenth Amendment of the United States Constitution and is therefore void as it applies to the State of California until the State affirmatively assumes PL 280 jurisdiction.

Pursuant to All Claims for Relief:

13. That the Court award such other relief as may be deemed just and appropriate;

14. That Plaintiffs be awarded their costs of suit.

Dated this 4th day of August, 2000

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By:

DEMAND FOR JURY TRIAL

Plaintiffs, pursuant to Federal Rule of Civil Procedure, Rule 38(b), hereby demand a trial by jury.

Dated this 4th day of August, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV-F-00-6153 REC LJO

[Filed November 22, 2000]

BISHOP PAUITE TRIBE and
BISHOP PAUITE GAMING CORPORATION
d.b.a. PAUITE PALACE CASINO
Plaintiffs,

v.

COUNTY OF INYO, PHILLIP MCDOWELL, individually and in his official capacity, and DANIEL LUCAS, individually and in his official capacity,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On October 30, 2000 the court heard defendants' Motion to Dismiss. Upon due consideration of the written and oral arguments and the record herein, the court grants the motion for the reasons set forth herein.

I. Plaintiffs' Allegations

Plaintiffs allege five claims in the Complaint. In the first claim, plaintiffs aver that some time after February 14, 2000, the Inyo County District' Attorney's office requested the Paiute Palace Casino to provide it with payroll records for three casino employees-- Patricia Dewey, Clifford Dewey and

Tinya Hill -- all members of the Bishop Paiute Tribe. Complaint, ¶¶ 17 & 19. The request related to an investigation then being undertaken by the district attorney's office into potential welfare fraud. *Id.* at ¶ 17. In response to the request, the casino informed the district attorney's office that it was Plaintiff's long standing custom, practice and policy not to provide the records unless it got written authorization to do so from the three employees. *Id.* Thereafter, on March 23, 2000, the district attorney's office obtained a search warrant for the records. *Id.* at ¶ 18. Plaintiffs further allege that the search was executed with the assistance of the Sheriff's Department for the County of Inyo, by use of force and intimidation. *Id.* at ¶ 21. Deadbolt cutters were used to cut the locks off of the storage facility where the confidential personnel records were stored. *Id.* The records allegedly were not limited to the individuals identified in the search warrant but also included the personnel records of seventy-eight other employees who were not subject to criminal investigation. *Id.*

Plaintiffs' also allege that the search warrant is unlawful because it infringed upon plaintiffs' right to remain free from state interference with their right to self-governance as proscribed by federal law. *Id.* at ¶ 28. Plaintiff contend that Public Law 280 does not permit the defendants to execute a search warrant covering casino property. *Id.* Plaintiffs seek declaratory relief against all defendants, declaring that Public Law 280 does not allow for the issuance and execution of search warrants upon casino property.

The second claim is also a request for declaratory relief. Plaintiffs allege that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, preempts whatever

jurisdiction the State of California otherwise might have to directly apply and enforce California laws against plaintiffs and their officers, agents, employees, contractors and patrons in any manner within the Pauite Palace Casino. *Id.* at ¶ 29. In addition, plaintiffs allege that the Tribal-State Compact allows the state's access to the records solely to ensure the compliance of the compact. *Id.* at ¶ 30-31.

The third claim alleges a section 1983 claim. Plaintiffs aver that in obtaining and executing the search warrant, District Attorney Phillip McDowell and Sheriff Dan Lucas acted willfully, knowingly and with specific intent to deprive plaintiffs of their constitutional rights and rights under the IGRA. *Id.* at ¶ 38. Plaintiff also alleges that defendant McDowell acted consistently with the policies of the County of Inyo. Plaintiff request monetary damages and attorney's fees.

Plaintiffs' fourth claim seeks an injunction against the County, District Attorney McDowell, Sherif Lucas and their deputies and subordinates to enjoin them from obtaining additional search warrants to obtain employment records in connection with other fraud investigations. *Id.* at ¶¶ 22, and 41-42.

The fifth claim seeks declaratory relief in connection with a request for supplemental jurisdiction under 28 U.S.C. 1367(a). *Id.* at ¶ 44. Plaintiffs allege that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California Legislature has not specifically enacted legislation accepting such jurisdiction. *Id*, at ¶¶ 45-48. Alternatively, plaintiffs seek a declaratory judgment that Public Law 280 is invalid because the Tenth Amendment

precludes Congress from directing California to assume criminal jurisdiction over Indian lands. *Id.* at ¶ 52.

II. Motion to Dismiss under Fed. R. Civ. p. 12(b) (6)

A. Standard

Under Rule 12(b) (6), "dismissal for failure to state a claim is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' "*Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). Rule 12(b)(6) should be read in conjunction with Rule 8 (a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1355-56 (1990). Moreover, a court "must accept all material allegations in the complaint as true, and construe them in the light most favorable [to the plaintiff]." *NL Industries v. Kaplan*, 792 F.2d 896 (9th Cir. 1986).

In addition, unless a Rule 12 (b)(6) motion is converted to a motion for summary judgment, "evidence outside the pleadings ... cannot normally be considered in deciding a 12(b) (6) motion." *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). However, a court may consider material submitted as part of the complaint and take judicial notice of facts outside the pleadings. *Hal Roach Studios v. Richard Fiener & Co.*, 896 F.2d 1542, 1554 n.19 (9th Cir. 1990); *Mack v. South Bay Beer Distribs., Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986). Furthermore, "documents whose contents are alleged in a complaint and whose authenticity no

party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (documents referred to in complaint but not attached to complaint may be considered by trial court for Rule 12(b) (6) motion); *Parrino v, FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). Where claims in the complaint are made based on documents, the documents are no longer matters outside the pleadings but are part of the record. *Townsend v. Columbia Operations,* 667 F.2d 844, 848 (9th Cir. 1982).

B. Judicial Notice

Under Federal Rule Evidence 201(d), the court shall take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

In connection with its motion to dismiss, defendants req/lest judicial notice of the following: (1) the search warrant affidavit; (2) the search warrant; (3) the return to the search warrant; (4) the State of California IEVS/Integrated Fraud Detention System report; (5) the documents obtained in the search warrant; (6) the Deed to the casino execution of property; (7) the Tribal-State Compact; and (8) notice of the approval of the Compact in the Federal Register.

The documents are specifically referred to in the Complaint and its authenticity is not questioned by either parties. Moreover, the documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned because they are official records and documents. Thus, the court takes judicial notice of the documents.

C. Section 1983 Claim

1. County of Inyo

Defendants contend that plaintiffs' section 1983 claim[1] against the County of Inyo should be dismissed because the County is not liable for the acts of the district attorney and sheriff in the performance of their official prosecutorial, investigative and law enforcement duties.

A local government may not be sued under § 1983 for constitutional torts inflicted by its employees or agents unless a plaintiff can show that his injury was the result of the government's policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). There is no respondeat superior liability under section 1983. *Id.* at

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[1] 42 U.S.C. section 1983 provides: Every' person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

692. "To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000) (quoting *McMillian v. Monroe County, Alabama,* 520 U.S. 781, 785 (1997)). The court's determination of whether the official is acting for the state or the county is dependent on an analysis of state law based on the state's constitution, statutes and case law. *McMillian*, 520 U.S. at 785, 787-93.

Under the California Constitution, both the sheriff and the district attorney have dual roles as agents for the state and the county. Article XI, section l(b) states that "the Legislature shall provide ... an elected county sheriff, an elected district attorney " Article XI, section 4 establishes county charters that provide for an elected sheriff and an elected district attorney ... their election or appointment, compensation, terms and removal." Article IV, section 13 allows the Attorney General to have "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as the Attorney General may seem advisable."

Likewise, under California statutory law, the sheriff and district attorney have dual functions as both state and county officials. There are some provisions that suggest that

the sheriff and district attorney are county officers. Cal. Gov. Code § 24000 states that both the sheriff and district attorney are county officers. In addition, counties set the salaries of the sheriff and district attorney under Cal. Gov. Code § 25300. Also, the sheriff and district attorney must be registered to vote in their respective counties pursuant to Cal. Gov. Code § 24001. Moreover, under Cal. Gov. Code § 3060, the sheriff and the district attorney can be removed from office following the accusation of the county grand jury. Finally, Cal. Gov. Code § 25303 allows the county to supervise the sheriff and district attorney's conduct and use of public funds. However, there are other provisions that indicate that the sheriff and district attorney are state officers. Cal. Gov. Code § 25303 provides that county supervision "shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney." In addition, Cal. Gov. Code §§ 12550 and 12560 provide the Attorney General direct supervision over the sheriffs and district attorneys and may require of them written reports concerning the investigation, detection and punishment of crimes in their respective jurisdictions. Moreover, under Cal. Gov. Code § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the Jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also, the Attorney General can call into conference the sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal. Gov. Code § 12524.

With respect to case law, the Ninth Circuit has stated that the federal court must consider California state law to

give due respect to decisions by the California Supreme Court as the ultimate interpreter of California state law. *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir 2000) Moreover the court stated that "[a]ll relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal investigations." *Id.*

In *Pitts v. County of Kern,* 17 Cal.4th 340, 362 (1998), the California Supreme Court after a *McMillian* analysis, concluded that the district attorney represented the state when preparing to prosecute and when prosecuting criminal violations of state law. Likewise, in *Weiner*, the Ninth Circuit found that the district attorney was a state officer when deciding whether to prosecute an individual. *Weiner*, 210 F.3d at 1031.

With respect to whether the sheriff acts as a county or state officer, the state and federal courts have reached differing conclusions. The court in County of *Los Angeles v. Superior Court (Peters)*, 68 Cal. App.4th 1166, 1178 (1998), concluded that in setting policies concerning the release of persons from the county jail, the sheriff acted as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the county. Moreover, two district courts have hell that the sheriff acts as a state official when providing security for the superior court. *Hawkins v. Comparet-Cassani,* 33 F. Supp.2d 1244, 1253 (C.D. Cal. 1999); *Boakye-Yiadom v. County of San Francisco*, 1999 WL 638260, at * 3 (N.D. Cal. August 18, 1999). In addition, one district court found that the Sheriff is a state official when acting as a jailer. *Smith v. County of San Mateo*, 1999 WL 672318, at *7 (N.D. Cal. Aug. 20, 1999). However, another

district court held the opposite, concluding that the sheriff acted on behalf of the county when he operated the county jail and made policy concerning the treatment of inmates and arrestees in need of medical attention. *Leon v. County of San Diego*, 2000 WIL 1476330, at *5 (S.D. Cal. Sept. 9, 2000). In addition, a district court has held that the sheriff is a county official when he encourages mistreatment of female crime victims or does not adequately prepare his staff to deal with female spousal abuse victims. *Roe v. County of Lake*, 107 F. Supp.2d 1146, 1152 (N.D. Cal 2000).

In the present case plaintiffs allege that the County is liable because the sheriff and the district attorney executed the search warrant in their investigative capacities as county officials, However, based on statutory law and case law, the court concludes that the sheriff and the district attorney acted as state officials when the district attorney requested the search warrant from the superior court and the sheriff executed the search warrant. First, under Article IV, section 13, the Attorney General has direct supervision over every district attorney and sheriff and may require them to make reports concerning the investigation, detection, prosecution, and punishment of crime in their, respective jurisdictions as the Attorney General may seem advisable. This language is reflected in Cal. Gov Code § 12550 and 12560. Second, under § 12560, the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court. Also the attorney General can call into conference the district attorneys and sheriffs for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law under Cal.

Gov. Code § 12524. Third, when the sheriff and or his deputies execute the search warrant, they act at the bequest of the superior court, which issued the search warrant Unlike *Roe*, which dealt with the sheriff departments treatment of women victims, and *Leon*, which addressed the medical treatment of arrestees, the present case deals with the execution of a facially valid search warrant ordered by the superior judge, a state official. Here, the situation is more similar to *Hawkins* and *Boakye-Yiadom*, where the courts held that the sheriff acted as a state official when he provided security for the superior court. Finally, the district attorney and sheriff were conducting an investigation into the alleged violations of state felonies involving welfare fraud when they executed the search warrant. Notwithstanding the fact that the County is responsible for the investigation of applications for Aid to Families with Dependent Children (ADFC) under Cal. Wel. & Inst. Code § 18491 and the administration of AFDC programs pursuant to Cal. Wel. & Inst. Code § 18470, the court finds that the search warrant was obtained and executed in furtherance of state law to prevent welfare fraud.

2. District Attorney

Neither states nor state officials acting in their official capacities are "persons" within the meaning of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). "[A] suit against a state official in his or her official is not a suit against the official but rather is a suit against the official's office." *Id.* Personal capacity suits seek to impose personal liability upon a government official for the actions that he takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "official capacity suits, in contrast,

'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* (citation omitted).

The court finds that the district attorney acted in his official capacity as a state official when the district attorney's office obtained a search warrant in connection with the welfare fraud investigation. Thus, the district attorney is not liable in his official capacity because he is not a person for purposes of section 1983 liability.

With respect to the personal capacity suit, defendant McDowell argues that he has absolute and qualified immunity.

The prosecutor is afforded absolute immunity from a civil suit for damages under § 1983 when initiating a prosecution and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) An absolute immunity defeats the suit at the outset provided that the official's actions were within the scope of the immunity. *Id.* at 419 n.13. The Supreme Court declined to consider whether absolute immunity applied to aspects of the prosecutor's responsibilities that cast him in the role of an administrator or investigative officer rather than that of advocate. *Id.* at 430-31. In particular, the Court left standing *Pierson v. Ray*, 386 U.S. 547, 557 (1967) which held that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to a police officer's defense. *Id.* at 430.

In the present case, the district attorney's office filed for the search warrant during an investigation into welfare

fraud. Thus, the district attorney is not afforded absolute immunity but has qualified immunity.

Government officers performing discretionary functions may exert a qualified immunity in so far as their conduct does not violate clearly established statutory or constitutional rights that would have been known to a reasonable person. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Horlow*, 457 U.S. at 818. The judge may appropriately consider whether the law was clearly established at the time the action occurred. *Id.*

Here, plaintiffs allege that District Attorney McDowell was put on inquiry notice that his acts where illegal based on the California's policy with respect to tribal sovereignty. Plaintiffs point to the preamble to the Compact as evidence of the stare's policy of fostering tribal-state cooperation. In addition, plaintiffs argue that Cal. Fish & Game Code § 1600-1610 authorizes the Department of Fish & Ga/ne to execute agreements on behalf of the State and other Native American tribes; thus, there is tribal-state cooperation with respect to jurisdictional disputes. Finally, the California Legislature recently passed Assembly Concurrent Resolution No. 185, which:

> reaffirms state recognition of the sovereign status of federally recognized Indian tribes as separate and independent political communities within the United States, and encouraging all state agencies, when engaging in activities or developing policies affecting Native American tribal rights or trust resources, to do so in a knowledgeable, sensitive manner that is respectful of tribal sovereignty, and encourage all state agencies to continue to reevaluat, and improve the implementation of laws affecting the Native American tribal rights.

In addition, plaintiffs argue that the search warrant was invalid because it failed to inform the superior court that there was no jurisdiction to execute the search warrant and the seized records of seventy-eight other tribal employees went beyond the scope of the search warrant.

A fraud investigation that required the search and seizure of payroll records does not violate California policy even in light of the State's recent expression of respect and recognition for tribal sovereignty. California's policy does not conflict with Public Law 280, which allows the state and thus the district attorney to impose California criminal law on tribal lands. Moreover, the district attorney's alleged failure in informing the court of possible jurisdictional problems is not troubling because the magistrate should have considered this when he issued the search warrant. Thus, the court concludes that the district attorney has qualified immunity because his conduct did not violate any clearly established statutory or constitutional rights.

3. Sheriff

The sheriff was acting as a state officer when his department executed the warrant. As such, he is not liable under section 1983 in his official capacity. With respect to the individual capacity suit, the sheriff has qualified immunity because his department merely executed a facially valid search warrant signed by the magistrate. Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's Scope because each page contained at least one reference to the employees that were under investigation.

D. Public Law 280 and Sovereign Immunity

Plaintiffs contend that their sovereign immunity precluded the issuance of the search warrant. They contend that Public Law 280 does not provide the defendants with authority to search and seize the payroll records even where there is probable cause under the Fourth Amendment. Defendants assert that they are entitled to obtain and execute the search warrant pursuant to Public Law 280.

Public Law 280 grants certain states criminal jurisdiction over Indians who commit or are victims of crimes on reservations. Section 18 U.S.C. § 1162 provides in pertinent part:

> Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country to the same extent that such

> State . . . has jurisdiction over offenses committed elsewhere within the State. . .and the criminal laws Of such State . . .shall have the same force and effect within such Indian country as they have elsewhere within the State. . . :
> California. . . all Indian country within the State.

The Supreme Court explained that "the primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County,* 426 U.S. 373, 379 (1976). In determining whether a state has Public Law 280 jurisdiction, the court must look to the intent of the state law. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209(1987). If the intent of the state law is generally to prohibit certain conduct, the conduct falls within Public law 280's grant of criminal jurisdiction as criminal/prohibitory; but, if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation. *Id.*

Here, California has criminal jurisdiction over Native Americans oh tribal lands under Public Law 280 because the laws that the district attorney and sheriff sought to enforce are criminal/prohibitory laws rather than regulations. The more difficult question is whether the state has jurisdiction over the tribe itself.

In *Bryan v. Itasca County*, the Supreme Court indicated that Public Law 280 did not explicitly confer state jurisdiction over tribes. The court stated,

> [N]othing in [Public Law 280]'s legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes, into little more than "private, voluntary organizations" - a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for the "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe . . .if not inconsistent with any applicable civil law of the State" contemplates the continuing vitality of tribal government.

Bryan v. Itasca County, 426 U.S. at 388 (citations omitted). However, the discussion of Public Law 280 was in connection with the Court's review of 28 U.S.C. § 1360, which grants limited civil jurisdiction to the states. Moreover, the Supreme Court has refused to apply a per se rule that would exclude state jurisdiction over tribes and tribal members in the absence

of express congressional consent. *Cabazon Bond of Mission Indians*, 480 U.S. at 214-15.

In *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), the Native American defendant was accused of raping another Native American. He requested documents relating to the victim's alleged alcohol and drug problems that were in the possession of a tribe's Department of Social and Health Services. *Id.* The district court quashed the subpoena to the Quinault Indian Nation based upon sovereign immunity. On appeal, the Ninth Circuit affirmed. The court stated,

> By making individual Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is waived. . . The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim.

Id. at 1319. The court concluded that the Quinault Tribe possessed tribal immunity at the time the subpoena was served. *Id.* Moreover, !the court found that the Quinault Indian Nation did not explicitly waive its sovereign immunity in the Social and Health Services documents when it voluntarily gave different documents relating to the victim that were located in the Housing Authority files. *Id.* at 120.

The plaintiffs seek to analogize *United States v. James* to the present case. Plaintiffs argue that if the Ninth Circuit finds no authority for the federal court to obtain tribal records by issuance of a subpoena, then the State and its political

subdivisions should have no greater authority to seize payroll documents pursuant to a search warrant. However, the present case is distinguishable from *James*. In *James*, the tribe was a third party and was not directly involved in the criminal prosecution. The tribe asserted sovereign immunity to protect the Native American victim and to foster confidence in the tribe's Social and Health Services. In the present case, plaintiffs' claim of sovereign immunity advances the tribe's right to self-governance, but does so, at the expense of the state's interest in preventing welfare fraud. In the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant against the tribe and tribal property. Thus, the court finds that the tribe's sovereign immunity does not prohibit the execution of the search warrant against the tribe and its property.

E. Indian Gaming Regulatory Act

The plaintiffs argue that the IGRA eviscerated any jurisdiction that Defendants asserted prior to the passage of IGRA. In addition, the plaintiffs argue that there was no compact in place at the time of the unlawful search of the Tribe's gaming facility.

The IGRA provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country" in the absence of a compact providing for state jurisdiction. 18 U.S.C. § 1166(d). "If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision20 has been impliedly repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994).

As the Eight Circuit explained, "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it to completely preempt state law." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996).

Here, the investigation and the execution of the search warrant involves welfare fraud, not gaming regulation by the state. The fact that the search warrant was executed at a gaming facility is unimportant. Because the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption. Although both parties mention the Compact in their analysis of whether there is IGRA preemption of Public Law 280, the court does not address the Compact because it concludes that IGRA does not preempt Public Law 280.

F. Constitutionality of Public Law 280

Plaintiffs contend that the California Legislature must affirmatively adopt Public Law 280 before the executive branch may impose criminal jurisdiction. Plaintiffs argue that the executive branch may not assume the fundamental act of establishing policy or be delegated the act of establishing policy by the legislature. As plaintiffs acknowledge, the one case addressing this issue under California law directly contradicts plaintiffs' argument.

In *People v. Miranda*, 106 Cal. App.3d 504, 505 (1980), the Native American defendant was charged with arson committed on Indian land. The trial court held that the California courts did not have jurisdiction. *Id.* The appeals court reversed. *Id.* The court stated that "it was not required

that California enact some form of enabling legislation to assume jurisdiction before the terms of 18 U.S.C. 1162 became effective in this state." The Tenth Circuit, analyzing Colorado law agreed, stating:

> A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the state, with jurisdiction unless such state law itself prevents the state from exercising such jurisdiction. Upon cessation of such jurisdiction to a state, federal law no longer preempts the state's exercise of its inherent police power over all persons within its borders, and the state is automatically vested with jurisdiction in the absence of state law to the contrary.

The plaintiffs distinguish *Burch* from the present case by arguing that *Burch* involved Colorado law, not California law. According to plaintiffs, Colorado is different from California because it was a voluntary state that became a mandatory state in 1984 while California was one of the five mandatory states when Public Law 280 was enacted. Because Colorado only later became a mandatory state, the *Burch* court only addressed preemption. Plaintiffs argue that the analysis for California law is different from Burch because California's Tenth Amendment was and continues to be violated by Public Law 280. Plaintiffs' attempt to distinguish the holding of *Miranda* from the present case is unpersuasive because there is no Tenth Amendment violation as the court will address shortly. Since there are no cases to the contrary after fifty years, the court concludes that Public Law 280 is

enforceable by the executive branch without need of an enabling act.

Finally, plaintiffs argue that Public Law 280 violates the Tenth Amendment. They contend, that Public Law 280 improperly imposes upon California, the burden of implementing the federal government's scheme to meet the federal government's obligation to ensure law and order on Indian lands.

The court agrees with the defendants that there is no implementation of a federal government scheme here. There is no attempt by congress to mandate that the state assist in the enforcement of a federal statutory scheme such as in *Printz v. United States*, 521 U.S. 898 (1997) or to require the state legislature enact one of three laws proposed by the federal government as in *New York v. United States*, 505 U.S. 144, 162 (1992). Rather, Public Law 280 allows California to impose its own state criminal law. Here, Congress is simply allowing California to exert its police power over the Indian lands within its boundaries. Thus, the court finds that Congress did not violate the, Tenth Amendment in passing Public Law 280.

ACCORDINGLY, IT IS SO ORDERED that Defendants' Motion to Dismiss be granted.

Dated: November 22, 2000.

/s/ _____
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed January 4, 2002]

No. 01-15007

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; BISHOP PAIUTE GAMING CORPORATION, d.b.a. the PAIUTE PALACE CASINO,
Plaintiffs-Appellants,

v.

COUNTY OF INYO; PHILLIP MCDOWELL, individually and in his official capacity as District Attorney of the County of Inyo; DANIEL LUCAS, individually and in his official capacity as Sheriff of the County of Inyo,
Defendants-Appellees.

OPINION

[The full text of this item is located in the Petition Appendix at pages 9a-43a. Rule 26.1]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15007

[Filed May 20, 2002]

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; Bishop Paiute Gaming Corporation, d.b.a. the Paiute Palace Casino,

Plaintiffs-Appellants,

v.

COUNTY OF INYO; Phillip McDowell, individually and in his official capacity as District Attorney of the County of Inyo; Daniel Lucas, individually and in his official capacity as Sheriff of the County of Inyo,

Defendants-Appellees.

Before: PREGERSON and RAWLINSON, Circuit Judges, and WEINER,[1] District Judge.

[1] Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND THE SUGGESTION FOR REHEARING EN BANC

[The full text of this item is located in the Petition Appendix at pages 9a-43a. Rule 26.1]

United States Court of Appeals
Ninth Circuit

No. 01-15007

[Filed January 4, 2002]

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; Bishop Paiute Gaming Corporation, d.b.a. the Paiute Palace Casino, Plaintiffs-Appellants,	)
v.	)
COUNTY OF INYO; Phillip McDowell, individually and in his official capacity as District Attorney of the County of Inyo; Daniel Lucas, individually and in his official capacity as Sheriff of the County of Inyo, Defendants-Appellees.	)

As Amended on Denial of Rehearing and Suggestion for Rehearing En Banc May 20, 2002

Appeal from the United States District Court for the Eastern District of California. Robert E. Coyle, Senior District Judge, Presiding. D.C. No. CV-00- 6153-REC/LJO.

JUDGES:
Before PREGERSON and RAWLINSON, Circuit Judges, and WEINER,* District Judge.

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* The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

AMENDED OPINION

PREGERSON, Circuit Judge:

On March 23, 2000, the District Attorney for the County of Inyo ("District Attorney") and the Sheriff for the County of Inyo ("Sheriff") obtained and executed a warrant to search Bishop Paiute Gaming Corporation ("Corporation") employee records held in the possession and control of the Bishop Paiute Tribe ("Tribe") in Bishop, California, as part of a welfare fraud investigation. The Tribe and the Corporation brought suit against the County of Inyo ("County"), the District Attorney, and the Sheriff (collectively "Defendants") under federal and state law seeking injunctive and declaratory relief, and damages under 42 U.S.C. § 1983.

The District Court granted Defendants' motion to dismiss on each of the Plaintiffs' claims. On appeal, the Tribe raises several arguments concerning the authority of the County to obtain and execute a search warrant against the Tribe. First, the Tribe argues that Public Law 280--which grants California criminal jurisdiction over offenses committed by or against Indians--does not waive the Tribe's sovereign immunity, and thus the County exceeded its jurisdiction when it obtained and executed a search warrant against the Tribe. The Tribe also argues that the Indian Gaming and Regulatory Act preempts any jurisdiction the State of California might have to apply and enforce California's laws against the Tribe. Further, the Tribe argues that California has no jurisdiction over Indian lands pursuant to Public Law 280 because the California legislature has not specifically enacted legislation accepting such jurisdiction. Finally, the Tribe asserts that Public Law 280 is invalid because the Tenth Amendment precludes Congress from

directing California to assume criminal jurisdiction over Indian lands.

The Tribe also seeks damages under 42 U.S.C. § 1983 on the ground that the County and its agents violated the constitutional and civil rights of the Tribe when the District Attorney and Sheriff knowingly obtained and executed a search warrant in excess of their jurisdiction.

We find that the County and its agents violated the Tribe's sovereign immunity when they obtained and executed a search warrant against the Tribe and tribal property. We also find that the county District Attorney and Sheriff acted as county officers when they obtained and executed a search warrant over tribal property, thus subjecting the County to liability under 42 U.S.C. § 1983. Finally, we find that neither the District Attorney nor the Sheriff is entitled to qualified immunity because they violated clearly established law by executing a warrant outside of their jurisdiction. With respect to these conclusions, we reverse the District Court. With respect to the Tribe's remaining arguments concerning the County's authority to obtain and execute a warrant against the Tribe, we affirm the District Court.

A.

The Bishop Paiute Tribe ("Tribe") is a federally recognized tribe located on the Bishop Paiute Reservation in Bishop, California. The Bishop Paiute Gaming Corporation ("Corporation") is a tribally-chartered corporation wholly owned by the Tribe. The Corporation's sole purpose is to operate and manage Class II and Class III gaming, pursuant to a Tribal-State Compact, and under the legal authority of the

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The gaming facility is known as the Paiute Palace Casino ("Casino").

Shortly after February 14, 2000, personnel for the Casino received a request from the County of Inyo District Attorney's Office for records of three tribal member Casino employees. The stated purpose for the records was the County's investigation into alleged welfare fraud. On February 28, 2000, the Tribe's attorney informed the District Attorney that it was the Tribe's long-standing policy that the information requested would not be released unless the Tribe was authorized to do so in writing by the employees whose records were sought.

On March 22, 2000, Leslie Nixon, a peace officer with the District Attorney's Office, executed an affidavit in support of the issuance of a search warrant. The affidavit stated that she had reasonable and probable cause for believing that the employees' records would demonstrate that the three individuals had committed welfare fraud by receiving public assistance while employed. The affidavit stated that the three individuals had received such public assistance through the Inyo County Department of Health and Human Services during the period of April 1998 through June 1998.

Based on this affidavit, the Inyo County Superior Court issued a search warrant on March 23, 2000 authorizing a search of the Casino for the limited purpose of obtaining payroll records for the three tribal member Casino employees. The search warrant was executed that same day by the District Attorney for the County of Inyo, Phillip McDowell ("District

Attorney"), and Sheriff for the County of Inyo, Daniel Lucas ("Sheriff"). Deadbolt cutters were used to cut locks off secured facilities containing confidential personnel records.

The District Attorney and Sheriff seized two types of payroll records: the first consisted of time card entries, payroll registers, and payroll check registers; the second consisted of quarterly payroll tax information which the Tribe had earlier submitted to the State of California in its California State Quarterly Wage and Withholding Reports.

Despite the limited scope of the search warrant, the documents seized contained confidential information concerning seventy-eight other tribal member Casino employees who were not the subject of the warrant, in addition to information concerning the named three individuals. The District Attorney and the Sheriff failed to give the Tribe an opportunity to redact from the seized records this information not specified or identified by the terms and conditions of the search warrant. Additionally, at the time of the search, the Tribe asserted that the state court did not have jurisdiction to enforce a warrant against a sovereign tribe.

Subsequent to July 13, 2000, the Tribe's attorney received correspondence from the District Attorney indicating that the County wished to obtain personnel records for six additional tribal member Casino employees for the period of July 1999 through July 2000. The Tribe's attorney informed the District Attorney that the Tribe would be willing to accept, as evidence of the employees' consent to release the information requested, a redacted copy of the last page of the signed county welfare application which indicated that the

employment records of individuals applying for public assistance were subject to review by county officials. This offer was refused by the District Attorney.

The Tribe filed its complaint on August 4, 2000, seeking injunctive and declaratory relief and damages under 42 U.S.C. § 1983. On November 22, 2000, the District Court for the Eastern District of California granted Defendants' motion to dismiss. The District Court reached its decision on the grounds that: (1) the Tribe's sovereign immunity did not prohibit execution of the search warrant against the Tribe; (2) IGRA, which concerns gaming activities, does not preempt Public Law 280; (3) California was not required to enact enabling legislation before Public Law 280 became effective; (4) Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution; (5) the District Attorney and Sheriff acted as state officers and thus the County is not liable for their conduct; and, (6) the District Attorney and Sheriff are entitled to qualified immunity and thus not liable in their personal capacities.

For the following reasons, we reverse the District Court order as to its conclusion that the Tribe's sovereign immunity was not violated by the issuance and execution of the warrant, and as to the District Court's conclusion that the Tribe was not entitled to damages under 42 U.S.C. § 1983. As to the other conclusions reached by the District Court, we affirm.

B.

I. STANDARD OF REVIEW.

[1][2][3] The Tribe challenges the District Court Order granting Defendants' Motion to Dismiss pursuant to Federal Rule 12(b)(6). We review the District Court's dismissal for failure to state a claim de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998) (noting that "a complaint should not be dismissed unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). We review the issue of whether a tribe has sovereign immunity de novo. *Burlington N. R.Co. v. Blackfeet Tribe*, 924 F.2d 899, 901(9th Cir.1991). On review of a denial of a motion to dismiss based on qualified immunity, we have jurisdiction only to decide if defendant's conduct violated clearly established constitutional rights. *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 871-72 (9th Cir.1992).

II. THE SOVEREIGN GOVERNMENTAL STATUS OF THE TRIBE PREVENTS THE EXECUTION OF THE SEARCH WARRANT AGAINST THE TRIBE.

A. *Public Law 280 Did Not Waive the Tribe's Sovereign Immunity.*

This case requires this court to reconcile the plenary power of the States over residents within their borders with the semi autonomous status of Indians living on tribal reservations. More particularly, we are asked to determine whether Public Law 280, 18 U.S.C. § 1162(a)--which granted

several states criminal jurisdiction and limited civil jurisdiction over reservation Indians--can be read to infringe upon the sovereignty of Indian nations. An analysis of the jurisdictional reach of Public Law 280 necessarily must be taken against the backdrop of the Indian sovereignty doctrine. *See Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 475, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[4] The Supreme Court's jurisprudence regarding Indian sovereignty is governed by the "policy of leaving Indians free from state jurisdiction and control...." *Rice v. Olson,* 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). The Supreme Court has viewed tribal sovereign immunity as a considerable shield against intrusions of state law into Indian country. *See, e.g., Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

[5] Public Law 280 was adopted by Congress in response to the concern over the lawlessness on Indian reservations. *See Bryan v. Itasca County,* 426 U.S. 373, 379, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (citing Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 UCLA L. Rev. 535, 541-42 (1975)). As such, the statute was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations. Section 2 of the statute grants six states, including California, criminal jurisdiction over offenses

committed by or against Indians on the reservations.[1] Notably, the statute makes no mention of jurisdiction over Indian tribes.

[6] The denial of state jurisdiction over tribes is also consistent with the Supreme Court's canons of construction for Indian law cases. In interpreting the scope of Public Law 280, the Supreme Court has been "guided by that eminently sound and vital canon ... that statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan,* 426 U.S. at 391, 392 (citations omitted). Thus, any statutory ambiguity as to whether the State can enforce a warrant against the Tribe should be read to protect Indian sovereignty.

[7][8][9] Reading the plain language of the statute and applying long-established canons of construction relevant to Indian law cases, the United States Supreme Court and the Ninth Circuit have interpreted Public Law 280 to extend jurisdiction to individual Indians and not to Indian tribes. *See Id.* at 389, 96 S.Ct. 2102 (interpreting Public Law 280 and observing that "there is notably absent any conferral of state jurisdiction over the tribes themselves ..."); *California v. Quechan Tribe of Indians,* 595 F.2d 1153, 1156 (9th

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[1] Section 2(a), codified at 18 U.S.C. 1162(a) provides: "(a) Each of the States ... shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country ... to the same extent that such State ... has jurisdiction over offenses committed elsewhere within the State ..., and the criminal laws of such State ... shall have the same force and effect within such Indian country as they have elsewhere within the State...."

Cir.1979) (stating that "[n]either the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a Tribe's sovereign immunity"). Absent a waiver of sovereign immunity, tribes are immune from processes of the court.[2]

Nevertheless, Defendants argue that in light of Supreme Court decisions that have described an inherent limitation on tribal sovereignty, Public Law 280 must be read to grant jurisdiction to the states to execute a search warrant over the Tribe. *See, e.g., United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (holding that an Indian tribe retains jurisdiction to punish one of its members unless withdrawn by treaty, statute or implication as a necessary result of their dependent status); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211-12, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (holding that an Indian tribe's exercise of criminal jurisdiction over non-Indians is inconsistent with the domestic-dependent status of the tribes and that tribes may not assume such jurisdiction without congressional authorization). Defendants assert that because tribes are no longer possessed with the full attributes of a sovereign, it would be inconsistent with their dependent status

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[2] The District Court wrongly found that *Bryan* was inapplicable authority on the ground that the case concerned Public Law 280's grant of civil jurisdiction as opposed to criminal jurisdiction. Because the provisions granting criminal and civil jurisdiction are identical, cases interpreting Public Law 280's provision granting civil jurisdiction are instructive for interpreting Public Law 280's provision granting criminal jurisdiction. Thus, both *Bryan* and *Quechan Tribe* provide precedential authority that Public Law 280 does not diminish tribal sovereignty.

to bar the state from executing a search warrant against tribal property.

However, all the cases relied upon by Defendants involve instances where a tribe's sovereignty has been limited after it attempted to exert jurisdiction over non-member Indians or in cases involving attempted exertion of jurisdiction over non-tribal lands. This case involves the Tribe's assertion of jurisdiction over uniquely tribal property (Casino employee records) on tribal land. Thus, Defendants' assertion that the Tribe's inherent sovereignty has been lost by implication is not supported by law.

In sum, in enacting Public Law 280, Congress neither waived the sovereignty of the tribes, nor granted state jurisdiction over Indian tribes. Accordingly, we hold that Public Law 280 did not confer state jurisdiction over the Tribe.

B. *Execution of a Warrant Against the Tribe Violates Tribal Immunity.*

[10] Defendants argue that the execution of a warrant against the Tribe does not offend their status as a sovereign entity. The Tribe responds that their right to develop and enforce their internal tribal policies should be protected.

The Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines. The Tribe asserts that such policies are necessary to encourage truthfulness and accuracy in Casino employee records. As one of the only means by which the Tribe can generate

income and be self-sufficient, management of the Casino is uniquely part of the Tribe's government and infrastructure. Indeed, all governments create policies and procedures for the protection of their records. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 *et seq.;* California Public Records Act, Cal. Gov't Code § 6250. Undoubtedly, California's sovereign immunity would be compromised if the United States demanded that the State follow procedures other than those adopted by the state policymakers. Moreover, at issue is not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (noting that "the tribes and the Federal Government are firmly committed to the goal of promoting tribal self- government ..."). We conclude that the execution of a search warrant against the Tribe interferes with "the right of reservation Indians to make their own laws and be ruled by them." *Williams,* 358 U.S. at 220, 79 S.Ct. 269.

Defendants characterize the execution of the warrant against the Tribe as a "customary inconvenience" that would accompany the service on any business. However, this Circuit has held that a subpoena issued against a tribe is different and cannot be enforced because of tribal immunity. *See United States v. James,* 980 F.2d 1314 (9th Cir.1992). In *James,* the Indian defendant was prosecuted by the federal government for the crime of rape against another Indian pursuant to the grant of federal jurisdiction through the Indian Major Crimes Act, 18 U.S.C. § 1153. The defendant appealed his criminal conviction in part on the ground that the federal district court erred in quashing a subpoena that ordered the Quinault Tribe

to release documents in its possession relating to the victim's alcohol and drug problem. *Id.* at 1319. In affirming the district court's order to quash the subpoena, the court noted that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced" when it granted federal criminal jurisdiction over individual Indians for certain crimes pursuant to 18 U.S.C. § 1153. *Id.* at 1319. The court held that the Tribe was possessed of tribal immunity and thus the federal court lacked the jurisdiction to enforce a subpoena against an unwilling sovereign even though the federal government had jurisdiction to enforce federal criminal laws against individual Indians. *Id.* at 1319.

The ruling in *James* is directly relevant to our review of this case. The *James* Court correctly focused on the status of Indian tribes as sovereigns and denied the federal government the authority to compel disclosure of tribal documents. That the federal government may not pierce the sovereignty of Indian tribes, notwithstanding its constitutionally preemptive authority over Indian affairs, *see* U.S. Const. art. I, § 8, carries considerable weight in our review of this case.

The District Court distinguished *James* on two grounds, neither of which justifies its decision not to follow Circuit precedent. First, the District Court noted without further discussion that the tribe in *James* was a third party and not directly involved in the criminal proceeding. However, the District Court does not explain why the Tribe's status as Plaintiff in this case affords it any less protection against government intrusion of its sovereignty than was afforded the Quinault Tribe in *James*. In both *James* and the case at issue

here the tribes were in sole possession of confidential documents that the state or federal government claimed to need for effective prosecution of tribal members. In neither case was the tribe the subject of prosecution. Moreover, both tribes refused to disclose their documents because to do so would violate tribal policies.

[11] Second, the District Court balanced the interests at stake in *James,* compared them to those in the case at issue, and determined that the Bishop Paiute Tribe's interests were less compelling. However, the District Court offered no authority for the application of a balancing test in the present circumstances. By contrast, the Supreme Court has adopted a more categorical approach denying state jurisdiction where states attempt to assert such jurisdiction over a tribe absent a waiver by the tribe or a clear grant of authority by Congress. *See Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) (citing *Bryan,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710). Though the rule is not a *per se* rule, *see California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), cases applying a balancing test have involved state assertions of authority over non-members on reservations and in exceptional circumstances over the on-reservation activities of tribal members, *see, e.g., Mescalero Apache Tribe,* 462 U.S. at 331-332, 103 S.Ct. 2378; *Confederated Salish & Kootenai Tribes,* 425 U.S. at 480, 96 S.Ct. 1634. Because Defendants attempted to assert jurisdiction over the Tribe, and not over individual tribal members or non-members on tribal land, the District Court erroneously applied a balancing test.

[12] However, even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe. In *James,* the Quinault Tribe asserted sovereign immunity to "protect the Native American victim and to foster confidence in the tribe's Social and Health Services." The *James* Court held that the protection of tribal sovereignty justified the withholding of tribal documents even though they might be relevant to a federal criminal prosecution. *James,* 980 F.2d at 1319-1320. In the present case, the Tribe asserted sovereign immunity to protect its right to self-government. The enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income. The Tribe, like California or the federal government, has adopted certain polices and procedures regarding its records. These policies promote tribal interests, such as accuracy in tribal records, confidentiality of members' personal information and a trusting relationship with tribal members. The Tribe's employment policies also affect the Casino, the Tribe's predominant source of economic development revenue.

These interests should be weighed against Defendants' interest in investigating potential welfare fraud--something that could be accomplished through far less intrusive means than infringing on the Tribe's sovereignty. *See infra* Section II C. It is clear that the interests at stake for the Bishop Paiute Tribe are equally as great as those at stake for the Quinault Tribe in *James.* Moreover, we find that the state's interest in the present case--the prevention of welfare fraud--is not as great as the federal government's interest in the judicious criminal prosecution in *James,* and it is certainly not as great as protecting the Tribe's sovereign immunity. Thus,

this court reaffirms *James* and holds that the Tribe is possessed of sovereign immunity which bars execution of the warrant.[3]

C. *The County and Its Officials Have Other Less Intrusive Means to Investigate Allegations of Welfare Fraud by Tribal Members.*

Although Defendants may need to expeditiously enforce California's welfare laws, their interests must yield to the principles of immunity. *See United States v. United States Fidelity & Guarantee Co.*, 309 U.S. 506, 513, 60 S.Ct. 653, 84 L.Ed. 894 (1940). Defendants assert that a decision by this court to bar the enforcement of search warrants against tribal governments would hamper state and federal governments in their investigations of criminal conduct on Indian land. The Supreme Court has concluded that even though tribal sovereignty might prohibit the states from conducting law enforcement through the most effective means, other adequate alternatives exist. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (noting that "[t]here is no doubt that

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[3] Following principles of comity and this Circuit's jurisprudence, comparison to cases denying enforcement of state court subpoenas against the United States government is also appropriate. *See Quechan Tribe of Indians*, 595 F.2d at 1155 (noting that the "sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"). In *Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir.1997), the Ninth Circuit denied the enforcement of a subpoena against a Forest Service employee, holding that principles of sovereign immunity bar a state court from enforcing a subpoena against the United States.

sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). Thus, the fact that the County has the burden of seeking other methods to obtain the same information does not justify a diminution of the Tribe's sovereign status.

[13] The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer. The Tribe also contends that the County already had evidence of the alleged welfare fraud in its possession. Finally, Defendants had authority, under Public Law 280, to execute a search warrant against the individual tribal members. Such a search would likely uncover relevant documents. The District Attorney's interest in receiving this information through the processes of the court is no basis to chip away at the Tribe's sovereign status.

III. THE INDIAN GAMING AND REGULATORY ACT DOES NOT PREEMPT PUBLIC LAW 280 AS TO NON-GAMING CRIMES.

[14] The District Court correctly found that IGRA does not preempt Public Law 280 as to non-gaming crimes. IGRA

grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country...." 18 U.S.C. § 1166(d). *See United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir.1996). In interpreting the preemptive effect of IGRA, the Ninth Circuit stated that if the federal government's exclusive jurisdiction "is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d)." *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 540 (9th Cir. 1995). However, IGRA explicitly concerns gaming operations by Indian tribes. In this case, Defendants were seeking to enforce a warrant as part of an investigation into welfare fraud and not part of allegations of illegal gambling. As the District Court rightly noted, "[b]ecause the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption."

We affirm the District Court with respect to its rulings that IGRA did not preempt Public Law 280 as to non-gaming crimes.

IV. CALIFORNIA IS NOT REQUIRED TO AFFIRMATIVELY ADOPT PUBLIC LAW 280 IN ORDER TO ASSUME ITS GRANT OF JURISDICTION.

[15] The District Court correctly found that California was not required to enact enabling legislation that assumed jurisdiction before Public Law 280 would become effective in the State. A direct congressional grant of jurisdiction over Indian country does not require any further action to vest the

state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 471-72, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (explaining that Public Law 280's mandatory criminal jurisdiction "effected an immediate cession of criminal and civil jurisdiction over Indian country" to affected states). Moreover, California law has clearly held that it was "not required that California enact some form of enabling legislation to assume jurisdiction before the terms of [Public Law 280] became effective in this state." *People v. Miranda,* 106 Cal.App.3d 504, 165 Cal.Rptr. 154, 155 (Cal.Ct.App.1980). Other circuits have agreed. The Tenth Circuit found that a direct Congressional grant of jurisdiction over Indian land does not require any further action to vest the state with jurisdiction unless state law itself prevents the state from exercising such jurisdiction. *See United States v. Burch,* 169 F.3d 666, 671 (10th Cir.1999).

We affirm the District Court with respect to its ruling that California was not required to enact enabling legislation before Public Law 280 became effective.

V. PUBLIC LAW 280 DOES NOT VIOLATE THE TENTH AMENDMENT.

[16] The District Court correctly found that Public Law 280 does not violate the Tenth Amendment of the U.S. Constitution. Public Law 280 grants certain states jurisdictional authority to enforce state criminal laws and limited civil laws over individual Indians in Indian country. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). There is no attempt by Congress to mandate state participation in the

enforcement of a federal statutory scheme such as in *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), or to require a state legislature to adopt federal regulations such as in *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). By contrast, this federal grant of authority allows states to exert their own criminal and civil laws upon Indians.

We affirm the District Court with respect to its ruling that Congress did not violate the Tenth Amendment in passing Public Law 280.

VI. THE COUNTY OF INYO SHOULD BE HELD LIABLE FOR THE CONDUCT OF THE DISTRICT ATTORNEY AND SHERIFF IN OBTAINING AND EXECUTING THE SEARCH WARRANT AGAINST THE TRIBE.

[17][18][19] Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A municipality, however, cannot be held liable on a *respondeat superior* theory. *Id.* at 691, 98 S.Ct. 2018. To hold a local government liable for an official's conduct, a plaintiff must establish that the government official "(1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir.2000) (citing

McMillian v. Monroe County, 520 U.S. 781, 785, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997)).

A. *California Constitutional and Statutory Law and Case Law Favor a Finding that the District Attorney and the Sheriff Acted as County Officers In Obtaining and Executing the Warrant Against the Tribe.*

Whether the Sheriff and District Attorney acted as county officers is governed by the analytical framework set out in *McMillian.* In that case, the Supreme Court held that an Alabama sheriff could not be sued under § 1983 for intimidating witnesses into making false statements and suppressing exculpatory evidence because the sheriff was exercising state authority. In reaching this conclusion, the Supreme Court cautioned against a categorical approach, and instead inquired "whether government officials are final policy makers for the local government in a particular area or on a particular issue." *McMillian,* 520 U.S. at 785, 117 S.Ct. 1734. The *McMillian* Court directed its inquiry on an analysis of state law, closely examining the Alabama Constitution, statutes and case law. *Id.* at 786-87, 117 S.Ct. 1734.

When determining a county's liability under *McMillian,* the Ninth Circuit has engaged in an "independent analysis of California's constitution, statutes and case law." *Streit v. County of Los Angeles,* 236 F.3d 552, 561 (9th Cir.2001). The Ninth Circuit has given appropriate deference to a state's legal characterization of the government entities while at the same time recognizing that "federal law provides the rule of decision in section 1983 actions." *Id.* at 560

(citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 430 n. 5, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997)).

[20][21] We apply California law and find that the Inyo County District Attorney and Sheriff were acting as county officers. As in *McMillian,* our analysis must begin with the California Constitution. The *McMillian* Court relied heavily on two provisions of the Alabama Constitution. First, and "especially important for our purposes," is the provision in the Alabama Constitution designating a county sheriff as an executive officer. *McMillian,* 520 U.S. at 787, 117 S.Ct. 1734. Under the California Constitution, sheriffs and district attorneys are not designated as members of the executive branch. Instead, sheriffs and district attorneys in California are defined in Article XI of the Constitution, entitled "Local Government." Article XI, section 4 of the California Constitution provides that "County charters shall provide for ... an elected sheriff, an elected district attorney...."

The *McMillian* Court also gave weight to the fact that the Alabama Supreme Court had authority to impeach a county sheriff for neglect of office. *Id.* at 788, 117 S.Ct. 1734. By contrast, the California Constitution does not list sheriffs or district attorneys in Article IV, section 18, which provides for impeachment of a variety of state officers before the Legislature. Instead, sheriffs and district attorneys can be removed from office following the accusation of the county grand jury. Cal. Gov. Code § 3060.

Other provisions under the California Constitution and statutes also weigh in favor of finding the District Attorney and Sheriff to be county officers. California law explicitly states that the district attorney and the sheriff are county

officers. Cal. Gov. Code § 24000(a); § 24000(b). The countyboard of supervisors set the salaries of both the sheriff and district attorney. Cal. Gov. Code § 25300. Sheriffs and district attorneys must be registered to vote in their respective counties. Cal. Gov. Code § 24001. The county has the authority to supervise the sheriff and district attorney's conduct and use of public funds. Cal. Gov. Code § 25303. Finally, sheriffs in California are required to attend upon and obey state courts only within their county. Cal. Gov. Code § 26603.

In reaching its conclusion that the District Attorney and Sheriff acted as state officers, the District Court gave primary importance to the supervisory authority of the State Attorney General granted under the California Constitution[4] and state statutes. *See* Cal. Const. art. V, § 13 (providing that the Attorney General is to have "direct supervision over every district attorney and sheriff ... in all matters pertaining to the duties of their respective offices,...."); Cal. Gov. Code § 12560 (providing that the Attorney General can direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and

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[4] "This provision was added in 1934, when the voters approved Proposition 4. As then Alameda County District Attorney Earl Warren told the voters, this constitutional amendment was designed to 'address the lack of organization of our law enforcement agencies' by providing coordination and supervision by the Attorney General '[w]ithout curtailing the right of local self government.' " *See Roe v. County of Lake,* 107 F.Supp.2d 1146, 1150 (N. D.Cal.2000) (citing Argument in Favor of Proposition 4 by Earl Warren, District Attorney of Alameda County, 1934 General Election Ballot Pamphlet).

that he may direct the service of subpoenas, warrants of arrest, or other processes of court); Cal. Gov. Code § 12524 (providing that the Attorney General can call into conference the sheriffs and district attorneys for the purpose of discussing the duties of their office, with the view of uniform and adequate enforcement of state law); Cal. Gov. Code §§ 12550, 12560 (providing that the Attorney General has direct supervision over the sheriffs and district attorneys and may require of them written reports concerning investigations, detection and punishment of crimes in their respective jurisdictions).

However, "supervision by the Attorney General does not alter the status of sheriffs [and district attorneys] as elected county officials." *Brewster v. County of Shasta,* 112 F.Supp.2d 1185, 1190 (E.D.Cal.2000); *See also People v. Brophy,* 120 P.2d 946, 953 (Cal.Dist.Ct.App.1942) (Noting that constitutional oversight does not "contemplate absolute control and direction of such officials.... Especially is this true as to sheriffs and district attorneys...."). Moreover, to allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The California Constitution grants the Attorney General supervisory authority over all "other law enforcement officers as may be designated by law." Cal. Const. art. V, § 13. Under this provision, if taken to its logical extreme, *all* local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in *Monell,* which preserves § 1983 actions against local governments.

The District Court also accorded significance to the fact that the search warrant was obtained to prevent welfare fraud under the state welfare laws. However, the District Attorney and Sheriff were acting on behalf of the County's Department of Health and Human Services, the governmental entity responsible for the administration of the state's welfare laws, including the investigation of overpayments. *See* Cal. Welf. & Inst. Code § 10800 (providing that the administration of public social services is "declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties ..."). Thus, the fact that state welfare law was at issue does not support a finding that the District Attorney and Sheriff were acting as state officers in their investigation into alleged welfare fraud.

Case law also compels our finding that the District Attorney and Sheriff acted as county officers in obtaining and executing a search warrant against the Tribe.

1. The District Attorney Acted as a County Officer When He Obtained and Executed a Search Warrant Against the Tribe.

In concluding that the District Attorney acted as a state officer, the District Court relied on the California Supreme Court's decision in *Pitts v. County of Kern,* 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998). In *Pitts,* plaintiffs brought a § 1983 action against the district attorney and county alleging civil rights violations based on misconduct during criminal prosecution. In a thoughtful opinion, the California Supreme Court held that "when preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state ...." *Id.* at 934.

The California Supreme Court, however, recognized the dual roles that a county district attorney performs:

> He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the [county] board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Id. at 932-33 (citing, *Modoc County v. Spencer,* 103 Cal. 498, 37 P. 483, 484 (Cal.1894)). Using this framework, the California Supreme Court concluded that when a district attorney engages in prosecutorial conduct, he is a state officer, but at other times, he should be characterized as a county officer. *Pitts,* 70 Cal.Rptr.2d 823, 949 P.2d at 934.

Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision. In *Fletcher v. Kalina,* 93 F.3d 653, 655 (9th Cir.1996), the court held that a prosecutor was not entitled to absolute immunity for conduct in preparing a declaration in support of an arrest warrant. In reaching this conclusion, the *Fletcher* court relied on the Supreme Court's decision in *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). The

Supreme Court held in *Buckley* that a prosecutor was not absolutely immune when he allegedly fabricated evidence during the investigation by retaining a dubious expert witness. *Id.* at 273-75, 113 S.Ct. 2606. The Court reasoned that "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, ... and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested...." *Id.* at 273, 113 S.Ct. 2606 (citations omitted). Because the prosecutor's conduct in *Buckley* fell within the latter category, the Supreme Court denied absolute immunity. *See also Malley v. Briggs,* 475 U.S. 335, 342-43, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (holding that a police officer who secures an arrest warrant without probable cause cannot assert an absolute immunity defense).

In the present case, the District Attorney was not "*preparing to prosecute [or] prosecuting criminal violations,*" as was the situation in *Pitts. Pitts,* 70 Cal.Rptr.2d 823, 949 P.2d at 934 (emphasis supplied). Instead, the District Attorney was *investigating allegations* of welfare fraud, conduct more similar to that in *Fletcher.* At the time the District Attorney obtained the search warrant, no criminal complaint had been filed against the three tribal member Casino employees whose records were sought--the District Attorney was merely performing his role as "detective." This distinction was recognized and adopted by the District Court when it refused to grant the District Attorney absolute immunity, on the ground that he was engaging in investigatory conduct and not prosecutorial conduct. Finally, the California Penal Code identifies the commencement of prosecution for an offense in only four instances: (a) an

indictment or information is filed; (b) a complaint is filed charging a misdemeanor or infraction; (c) a case is certified to the superior court; or (d) an arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. Cal. Penal Code § 804. Because the District Attorney had taken none of these actions when he executed the search warrant, we find that the District Attorney was engaging in investigatory conduct more akin to that of a detective.

Relying on *Fletcher* and *Buckley,* and recognizing the significant factual distinctions between this case and *Pitts,* we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe.

2. The Sheriff Acted as a County Officer When He Executed a Search Warrant Against the Tribe.

With respect to the Sheriff's conduct, the District Court recognized that the California courts of appeal and federal district courts in this Circuit have reached different conclusions on whether a sheriff is a state or county officer. The majority of the cases cited by the District Court discuss the sheriffs' role in their function as jail administrators. However, since the District Court's ruling, the Ninth Circuit held that California sheriffs, functioning as jail administrators, are county officials. *See Streit,* 236 F.3d at 565. So holding,

the court relied heavily on the constitutionally and statutorily defined role of California sheriffs discussed above. *Streit,* 236 F.3d at 561-562; *see supra* pp. 562-64.

In support of our conclusion, we also rely on several recent federal district court decisions that hold that the sheriff is properly viewed as a county officer when he investigates alleged criminal conduct. *See Ford v. County of Marin,* 2001 WL 868877 at *8 (N.D.Cal. July 19, 2001) (denying defendants' motion to dismiss on the grounds that the sheriff, when knowingly giving false information to the Housing Authority with the intent of initiating a nuisance lawsuit, did not act as a state officer); *Brewster,* 112 F.Supp.2d at 1191 (holding that the sheriff, when investigating crimes, acts as a county officer).

Finally, we note persuasive language from the California Supreme Court on how the state's highest court views the role of county sheriffs. *Dibb v. County of San Diego,* 884 P.2d 1003 (Cal.1994). In a case concerning a county's authority to create a citizen board to oversee the Sheriff's Department, the court noted that "the operations of the sheriff's ... departments and the conduct of employees of th[at] department[] are a legitimate concern of the [county] board of supervisors." *Id.* at 1008.

Based on the foregoing, we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe.

B. *The District Attorney and Sheriff Have Final Decision Making Authority to Obtain and Execute a Search Warrant.*

There is no dispute that the District Attorney or Sheriff have final decision making authority to obtain and execute search warrants for the County of Inyo.

VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

[22] The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against county officers sued in their individual capacities. *Hafer v. Melo,* 502 U.S. 21, 25-27, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Demery v. Kupperman,* 735 F.2d 1139, 1146 n. 3 (9th Cir.1984).

[23] The District Court correctly held that neither the District Attorney nor the Sheriff is entitled to absolute immunity. However, the District Court erroneously concluded that the District Attorney and Sheriff were entitled to qualified immunity.

[24][25] Qualified immunity "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Our analysis of whether the defendants are entitled to qualified immunity

follows a two-part test: (1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and, if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful. See *Robinson v. Solano County,* 278 F.3d 1007, 1013 (9th Cir.2002) (en banc) (citing *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001)). We conclude, taking the facts in the light most favorable to the Tribe, that the search violated the Fourth Amendment, and that the law in this Circuit was clearly established at the time the search was executed such that it would have been clear to the District Attorney and Sheriff that their conduct was unlawful.

The Tribe has alleged a violation of the Fourth Amendment based on the District Attorney's and Sheriff's execution of a search warrant to seize tribal property (employee records) on tribal land. The Tribe contends that the search was unlawful because it was executed beyond the District Attorney's and Sheriff's jurisdiction. James is the leading case in our Circuit involving seizure of tribal property. 980 F.2d at 1319. In James, we held that a U.S. district court did not err when it quashed a subpoena ordering a tribe to release its documents because the tribe possessed tribal immunity. *Id.* Our holding in James was based on the conclusion that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the [federal] court...." *Id.* Accordingly, we found no "jurisdictional grant" from Congress which would require the

tribe to produce documents in a criminal prosecution against an individual Indian.[5]

[26] In James, we did not need to reach the issue whether the subpoena was lawful because it was never executed. Instead, we affirmed the district court's decision not to enforce the subpoena on the ground that the officers had no jurisdictional authority over the tribe. *James,* 980 F.2d at 1319. In the present case, the search warrant was executed but, as in James, the officers still had no jurisdictional authority to do so. Thus, based on the principles set forth in James, we conclude that the search warrant was in violation of the Fourth Amendment because the officers acted beyond their authority when they executed the search warrant against the Tribe and in excess of their jurisdiction.

Whether the execution of a search warrant against tribal property is constitutional was addressed in *Sycuan Band of Mission Indians v. Roache,* 788 F.Supp. 1498, 1508 (S.D.Cal.1992), aff'd. on other grounds, 54 F.3d 535, 543-44 (9th Cir.1995). In Sycuan Band, the San Diego County Sheriff's deputies executed a search warrant on the Sycuan, Barona, and Viejas Reservations and seized gaming devices, cash, and records owned by the tribes. *Sycuan Band,* 788

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[5] In *James,* the federal officers had authority to prosecute an individual Indian for violations of federal criminal laws under 18 U.S.C. § 1153. In the instant case, the county officers had authority to prosecute the individual Indians for violation of state welfare laws under Public Law 280. Under neither of these statutes did prosecutorial jurisdiction extend to tribes as sovereign entities. See Sect. B.II.

F.Supp. at 1501.[6] The district court held that the search warrants were invalid because the state did not have jurisdiction over the tribes and "the defendants, therefore, acted beyond their authority by executing the ... search warrants." *Id.* at 1508. In reaching its conclusion, the district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction." *Id.* (citing *United States v. Strother,* 578 F.2d 397, 399 (D.C.Cir.1978)).

Our conclusion that the county officers' conduct was in violation of the Fourth Amendment is buttressed by a closely analogous case from the Tenth Circuit. In *United States v. Baker,* 894 F.2d 1144 (10th Cir.1990), a county sheriff executed a search warrant on tribal property. The court held that because it was undisputed that the property was on tribal land and the state had never obtained jurisdiction over such lands, the search warrant was in violation of the Fourth Amendment. *Id.* at 1147.

In light of James and Sycuan Band, and the Tenth Circuit's conclusion in Baker, we hold that the District Attorney and Sheriff violated the Fourth Amendment when they executed the search warrant to seize tribal property held on tribal land because both the Tribe's property and land were

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[6] As in the present case, the search warrant was executed against the tribes in order to obtain information as part of a criminal investigation against individual Indians. n Sycuan Band and the present case, the officers had authority to enforce criminal law against individual Indians under Public Law 280, but did not have authority to enforce those criminal laws against tribes as sovereign entities.

outside the District Attorney's and Sheriff's jurisdiction. We further hold that this Fourth Amendment violation may merit relief under § 1983.[7]

Having concluded that the Tribe has alleged a violation of the Fourth Amendment, we turn to consider whether it would have been clear to the District Attorney and Sheriff at the time the warrant was executed that their conduct was unlawful. The conduct occurred in 2000, and so the law at that time must be our guide. *Robinson,* 278 F.3d at 1015.

[27] As the foregoing discussion reflects, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that there was no jurisdictional grant authorizing county officers to search and seize tribal property as part of a criminal prosecution of an individual Indian. See *James,* 980 F.2d at 1319. Indeed, the only court in this Circuit to address the precise question whether the execution of a search warrant against tribal property is constitutional held that it was not. See *Sycuan Band,* 788 F.Supp. at 1508. Moreover, the only circuit to address this issue concluded--seemingly without debate--that

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[7] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed in excess of the county officers' jurisdiction, is not precluded by *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657 (9th Cir.1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. The present case involves protection from an unlawful search and seizure. Here, the county officers had no jurisdiction to execute the search warrant and seize tribal property and, therefore, the search warrant violated the Fourth Amendment.

such a warrant would violate the Fourth Amendment. See *Baker,* 894 F.2d 1144. Accordingly, we find that no reasonable officer could have concluded that he had jurisdiction to search and seize tribal property as part of a criminal prosecution of an individual Indian, and no reasonable officer could have concluded that the lack of jurisdiction was a mere technicality.

We hold as a matter of law that a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction. Thus, the District Attorney and Sheriff are not entitled to qualified immunity.

AFFIRMED in part, REVERSED in part, and REMANDED.

291 F.3d 549, 2 Cal. Daily Op. Serv. 4329

SUPREME COURT OF THE UNITED STATES

02-281

[Filed December 2, 2002]

INYO COUNTY, A PUBLIC ENTITY, PHIL McDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY, DAN LUCAS, INDIVIDUALLY AND AS SHERIFF	)
v.	)
PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, ET AL.	)

Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 2002 U.S. App. LEXIS 69 (9th Cir. Cal. 2002)

JUDGES:
Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

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No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and has been sued in both his individual capacity, as well as in the official capacity of the elected District Attorney of Inyo County. Petitioner Dan Lucas is also an individual, and has also has been sued in both his individual capacity, as well as in the official capacity of the elected Sheriff of Inyo County. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

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No. 02-281

In the
Supreme Court of the United States

INYO COUNTY, ET AL.,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY
OF THE BISHOP COLONY, ET AL.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 9a-43a) is reported at 975 F.3d 893. The subsequent May 20, 2002 order of the court of appeals (Pet. App. 1a-8a) amending the original opinion, and denying the petition for rehearing *en banc,* was ordered published, and the final opinion of the court of appeals, as amended, is published at 291 F.3d 549. J.A. 145-179. The ruling of the district court granting petitioners' motion to dismiss (Pet. App., 44a-66a; J.A. 120-141) is unreported.

JURISDICTION

The original opinion of the Ninth Circuit was entered on January 4, 2002. Petitioners' timely petition for rehearing *en banc* was denied on May 20, 2002 (Pet. App. 1a-8a), and entered on that same date. The petition for writ of certiorari was filed on August 19, 2002, and was granted on December 2, 2002. J.A. 180. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S. Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

3. U.S. Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. § 1983.

This statute concerns and is entitled "Civil action for deprivation of rights." Its text is set forth in the petition appendix. Pet. App. 67a.

5. 18 U.S.C. § 1152.

This statute concerns crimes and Indians, and is commonly known as the "General Crimes Act." Its text is set forth in the petition appendix. Pet. App. 67a-68a.

6. 18 U.S.C. § 1153.

This statute also concerns crimes and Indians, and is commonly known as the "Major Crimes Act." Its text is set forth in the petition appendix. Pet. App. 68a-69a.

7. 18 U.S.C. § 1162.

This statute concerns State criminal law jurisdiction over criminal offenses committed by or against Indians in the Indian country within the six states identified in the statute. It does not address state criminal jurisdiction over criminal offenses committed off the reservation or otherwise outside of Indian country. This statute is commonly known as "Public Law 280," and its pertinent text is set forth in the petition appendix. Pet. App. 69a-71a.

STATEMENT

A. Fact Background

In March 1999, the California State Department of Social Services sent to the Inyo County Department of Health and Human Services a report known as the "IEVS/Integrated Fraud Detection System Report." Excerpts of Record ("ER") 136-A and 266.

This report is generated by the state from payroll information submitted by employers throughout the state. In order to generate the report, the California Department of Social Services "matches" the employer-reported income against the income being reported by persons receiving state public welfare assistance. When a "mismatch" is discovered, that is, when the amount of wages being reported by employers is in excess of that being reported by the public assistance recipients, the "Integrated Fraud Detection System Report" is generated and sent to the county administering the public assistance.

The Integrated Fraud Detection System Report which was sent to Inyo County in March 1999 advised that the Paiute Palace Casino, which is a gambling casino operated in Inyo County by respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and by respondent Bishop Paiute Gaming Corporation[1] had reported on its state employer's quarterly payroll tax returns that it had paid certain income to three employees identified in the report, and that these three employees, who were recipients of California public assistance welfare benefits for the time period involved, had not reported such income on their welfare application forms.

In short, these three employees, identified in the Integrated Fraud Detection System Report as Patricia Dewey, Clifford Dewey, and Tinya Hill, were reported as having earned income from Paiute-Shoshone, but had not reported that income to the state and county in connection with their (the employees') applications for public assistance welfare benefits, and in connection with the determination of the amount of their entitlement to those benefits.

After receipt of this information, the Inyo County Department of Health and Human Services notified the three employees of the discrepancies, and made requests that the employees reconcile the same. These requests were ignored.

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[1] The complaint alleges that the Bishop Paiute Gaming Corporation is a political subdivision of the tribe (J.A. 98), and that the sovereign status of the tribe is therefore shared by the Bishop Paiute Gaming Corporation (J.A. 100). Accordingly, both respondents are collectively referred to herein as the "Paiute-Shoshone."

The Department of Health and Human Services then forwarded the matter to the Inyo County District Attorney's Office for review, and the matter was assigned to DA Investigator Leslie Nixon, a California peace officer employed at the District Attorney's Office. After reviewing the files and matter, Investigator Nixon submitted her own requests to the three employees, again asking that the income discrepancies be reconciled. Again these requests for reconciliation were ignored.

Subsequent to these failed efforts to deal directly with the employees, Investigator Nixon attempted to obtain the relevant payroll information from their employer, the casino.[2]

After these requests to the casino for the subject payroll information were denied, Investigator Nixon submitted an affidavit in support of a petition for a search warrant to the California Superior Court. The affidavit advised the Court of the IEVS/Integrated Fraud Detection System Report, and further provided that overpayment of

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[2] In what is at least in part a disputed factual background (which is not controlling, however, with regard to the matters before the Court), Investigator Nixon sent her office's standard-form informal letter-requests to the Paiute Palace Casino, asking for the relevant payroll information for the three casino employees who were the subject of the investigation. On numerous prior occasions, Paiute-Shoshone had honored such informal requests for similar information without a search warrant (this is disputed by respondents). On this occasion, as it had on at least one prior occasion within the preceding year in connection with a different tribal agency – and in which case a search warrant had been obtained and honored – Paiute-Shoshone advised that it would not release the requested information unless a search warrant was obtained (this is also disputed by respondents).

benefit amounts in excess of $400.00 appeared to be in issue. ER 136, 136A-137. The conduct being investigated, theft of public funds, was within the parameters of several California criminal statutes, including grand theft, a felony, in violation of California Penal Code § 487(a), and Welfare Fraud, a felony, in violation of Welfare & Institutions Code § 10980(c).[3]

Based on the affidavit, a search warrant was issued by the Superior Court on March 23, 2000. ER 138-141. The search warrant provided in pertinent part as follows:

> "The people of the State of California to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo.
>
> "Proof by affidavit having been made this day before me . . . that the following ground or grounds for issuance of a search warrant exist:

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[3] California Penal Code § 487(a) provides: "Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400). . . ." Welfare & Institutions Code § 10980(c) provides: "Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact... or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows: ... (2) If the total amount of the aid obtained or retained is more than four hundred dollars ($400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000)...."

> "The property or things to be searched for consist of an item or items or constitute evidence which tend to show a felony has been committed or tend to show that a particular person has committed a felony,
>
> "YOU ARE THEREFORE COMMANDED to make a search in the daytime (7:00 a.m. to 10:00 p.m.) on and of the premises described as: Paiute Palace Casino located at 2742 North Sierra Highway 395, Bishop, Inyo County, California, for the following property: Payroll records for Patricia Dewey, date of birth 9-20-59, social security number 556-33-3889; Clifford Dewey, date of birth 11-27-54, social security number 558-98-0356; and Tinya Hill, date of birth 2-23-79, social security number 571-55-4327, for the period of April 1998 through June 1998, and if you find the same or any part thereof, to bring it forthwith as required by law before this court at 301 West Line Street, Bishop, California.
>
> "Given under my hand and dated, 3/23/00,
>
> "/s/ Patrick C. Canfield"
> (ER 138-141.)

Investigator Nixon then called the personnel at the administrative office of the casino, who she knew, advised that she had obtained the search warrant, and gave courtesy notice that she would be coming over to obtain the payroll

records.[4] Upon arrival at the casino, however, Investigator Nixon was told by casino management personnel, who were accompanied by several casino security guards, that the search warrant would not be recognized, that the casino was immune from search because Paiute-Shoshone was a sovereign government, and that although the records being sought by the search warrant were on-hand and located in an out-building behind the casino, on "the advice of counsel" Paiute-Shoshone was prohibiting her (Investigator Nixon) from searching for the records, and she was being denied access to the out-building.

During the foregoing conversation, Investigator Nixon had requested the key to the padlock securing the out-building were the records were stored. She was advised by Paiute-Shoshone that they had the key, but that again, on the advice of counsel, they were denying her request for the key.

In order to mitigate the potential for any disturbance, Investigator Nixon then asked that the Sheriff's Department be called. Sheriff's deputies responded, and after reviewing the warrant, advised that it appeared proper.[5] Investigator Nixon once again requested the key to the padlock, was denied, and accordingly, a bolt-cutter was used to cut the padlock. Investigator Nixon then searched the out-building,

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[4] The complaint alleges that although Investigator Nixon placed this call, she did not advise she would be executing a search warrant. J.A. 103-104.

[5] The search warrant (ER 138-141) is a command issued by the Court, not to the person or business being searched, but rather to all peace officers to search the premises described in the warrant, for the items described therein, and to bring any of the items found before the Court. Sheriff's deputies are, of course, peace officers.

with the casino's administrative staff showing which of the boxes contained the relevant records, and the records described in the search warrant were located and seized. ER 267-328.

At the request of Paiute-Shoshone, a copy of the records being taken was made on-premises, and was left with casino personnel. The seized records were then made the subject of a proper Return on the search warrant, and the same was filed with the Superior Court. ER 263-264.

The records obtained were of two types. The first type consisted of individual pages of computer records showing the hours worked, and compensation paid, for each of the three persons identified in the search warrant, for the time period specified in the warrant. The second type consisted of the portion of Paiute-Shoshone's employer's payroll tax returns that involved the reported wages of the three subject casino employees, as submitted to the State of California, for the time period specified in the search warrant. Care was taken by Investigator Nixon to obtain only the specific pages of records that actually contained the name and information pertaining to at least one of the three subjects identified in the search warrant. Thus, each page of information obtained contained information for one or more of the three subjects. [6]

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[6] Respondents have contended that the scope of the search exceeded that allowed by the warrant, because the computer lists of names on the pages seized contained information pertaining not only to the three subjects of the warrant, but also to other employees whose names were close in alphabetical order to the subjects' names, and therefore printed on the same page. Paiute-Shoshone therefore claimed that the "personnel records" of the other employees listed on these pages were improperly seized. The

Paiute-Shoshone thereafter filed this action in District Court, seeking declaratory and injunctive relief, and also seeking monetary damages for violation of its claimed Fourth Amendment rights pursuant to 42 U.S.C. § 1983. Attorneys fees and costs pursuant to 42 U.S.C. § 1988 were also sought.

In August 2000, petitioners Inyo County, District Attorney McDowell and Sheriff Lucas filed their motion for dismissal of the complaint pursuant to F.R.C.P. § 12(b)(6). J.A. 1. On November 22, 2000, the District Court filed its Order Granting Defendants' Motion to Dismiss, and judgment was entered in favor of petitioners Inyo County, Mr. McDowell and Sheriff Lucas on that same date. Pet. App. 44a-66a; J.A. 120-141.

Respondent Paiute-Shoshone timely appealed the District Court's order and judgment entered thereon, and on January 4, 2002, the Ninth Circuit filed its original opinion, reversing the District Court's judgment entered in favor of petitioners. Pet. App. 9a-43a.

Inyo County, District Attorney McDowell and Sheriff Lucas then timely filed a petition for rehearing *en banc*, and on May 20, 2002, the Ninth Circuit entered its order denying the petition for rehearing, and amending its earlier opinion. Pet. App. 1a-8a.

District Court rejected this argument, and stated: "Having reviewed the payroll records that were seized during the execution of the warrant, the court finds that the execution of the search warrant was within the warrant's scope because each page contained at least one reference to the employees that were under investigation." (Pet. App. 58a; ER 217; and ER 267-328, consisting of a copy of each of the actual pages seized.)

B. District Court Proceedings And Entry Of Judgment In Favor Of Inyo County, District Attorney McDowell And Sheriff Lucas

The complaint filed by Paiute-Shoshone in the District Court set forth five claims. The first claim sought declaratory relief and a judicial determination that Public Law 280 (18 U.S.C. § 1162) "cannot be interpreted in a manner that provides the State...the ability to exert criminal jurisdiction over the Bishop Paiute Tribe," and that any interpretation of Public Law 280 that would enable the execution of search warrants such as that in this case "acts as an infringement upon the Bishop Paiute Tribe's right to remain free from state interference with the Tribe's right to self-governance as proscribed (sic) by federal law." J.A. 106. The first claim also alleged that "Defendants lack any jurisdiction whatsoever to apply or enforce California laws regarding search and seizure of documents pertaining to criminal investigations against the Bishop Paiute Tribe and its political subdivisions." J.A. 106. In its prayer, the first claim also requested a judicial declaration and determination that the execution of the subject search warrant "violated federal laws and Plaintiffs' right to remain free from state interference with Plaintiffs' right to self-governance." J.A. 115.

The second claim sought declaratory relief and a judicial determination that the Indian Gaming Regulatory Act, set forth at 25 U.S.C. §§ 2701, et seq., ("IGRA") pre-empts "whatever jurisdiction the State of California otherwise might have to directly apply and enforce California's laws against Plaintiffs' their officers, agents, employees, contractors and patrons in any manner within the Paiute Palace Casino." J.A. 115.

The third claim alleged a violation of the claimed Constitutional rights of Paiute-Shoshone under the Fourth and Fourteenth Amendments, and also a violation of Paiute-Shoshone's claimed federal statutory rights under the IGRA, and sought monetary damages and attorneys fees under 42 U.S.C. §§ 1983 and 1988. J.A. 108-110, 117.

The fourth and fifth claims requested injunctive relief, and additional declaratory relief in the form of a judicial determination that Public Law 280 is "defective" because its enactment by Congress was in violation of the Tenth Amendment to the U.S. Constitution (J.A. 114); and that Public Law 280 is ineffective in California because the California legislature never enacted legislation accepting the jurisdiction described in Public Law 280 J.A. 111-114.

In response to the complaint, defendants (petitioners here) Inyo County (the "County"), District Attorney Phil McDowell (herein the "District Attorney" or "Mr. McDowell"), and Sheriff Dan Lucas (herein the "Sheriff" or "Sheriff Lucas"), filed a motion to dismiss the complaint under Federal Rules of Civil Procedure, Rule 12(b)(6). ER 24-25. In their motion, the County, Mr. McDowell and Sheriff Lucas addressed each of Paiute-Shoshone's claims, and also asserted various immunity defenses, including the defense of qualified immunity

2. In ruling on the 12(b)(6) motion, the District Court took judicial notice of a number of documents submitted by the moving parties. These documents were (1) the search warrant affidavit; (2) the search warrant; (3) the return to the search warrant; (4) the State of California IEVS/Integrated Fraud Detention System report; (5) the documents obtained in the search warrant; (6) the Deed to the casino property; (7) the Tribal-State Compact pursuant to the

IGRA between the State of California and Paiute-Shoshone; and (8) notice of the approval of the Compact in the Federal Register. Pet. App. 48a-49a; J.A. 124-125. On November 22, 2000, the District Court issued its order granting the motion to dismiss. Pet. App. 44a-66a; J.A. 120-141.

The District Court held that: (1) the tribe's sovereign immunity did not prohibit the execution of the search warrant against the tribe or its property (Pet. App. 62a; J.A. 138); (2) the IGRA did not preempt Public Law 280 because the investigation and warrant involved welfare fraud, and not gaming violations (Pet. App. 63a; J.A. 139); (3) Public Law 280 was enforceable in California by the executive branch without need of an enabling act being passed by the California Legislature (Pet. App. 65a; J.A. 140-141); (4) the passage of Public Law 280 did not violate the Tenth Amendment (Pet. App. 65a; J.A. 141); (5) District Attorney McDowell and Sheriff Lucas acted as state officers, and not county officers, and thus the County is not liable for their conduct or § 1983 damages (Pet. App. 53a-54a; J.A. 129-130); and (6) both the District Attorney and Sheriff were entitled to qualified immunity (Pet. App. 58a; J.A. 133-134).

Judgment was thereupon entered in favor of the County, Mr. McDowell and Sheriff Lucas. J.A. 1.

C. Court of Appeals' Reversal

Paiute-Shoshone appealed to the Ninth Circuit. In their answering brief, the County, District Attorney and Sheriff argued that the correct framework for the decision in this case was the line of Supreme Court decisions involving the nature and character of retained sovereignty possessed by tribes.

Those cases included *United States v. Kagama,* 118 U.S. 375, 381 (1886) ("*Kagama*") (Indian tribes are no longer "possessed of the full attributes of sovereignty"); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978) ("*Oliphant*") ("Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'"); *United States v. Wheeler,* 435 U.S. 313, 323 (1978) ("*Wheeler*") (Indian tribes still retain "...those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"; and "...the areas in which such implicit divesture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326); and *Montana v. United States,* 450 U.S. 544, 564 (1981) ("*Montana*") ("...exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"; and "...the powers of self-government...involve *only the relations among members of a tribe.*" *Id.* at 564, quoting *Wheeler,* 435 U.S. at 326 (italics by Court)).

The Ninth Circuit dismissed this line of cases as being inapplicable (Pet. App. 18a-19a), and reversed the District Court's rulings on three of the above-enumerated issues. The reversals were as to issue (1) above: the court of appeals held that tribal sovereign immunity does enable Indian tribes and businesses to prohibit the search of their property for evidence of off-reservation state crime, even when the search is pursuant to a search warrant issued on probable cause; issue (5) above: the court of appeals held that the District Attorney and Sheriff were acting as county and not state officers for § 1983 liability purposes, thus enabling § 1983 damages against

the individual defendants and Inyo County for the alleged violation of the Fourth Amendment); and issue (6) above: the court of appeals held that the District Attorney and Sheriff are not entitled to qualified immunity. Pet. App. 42a-43a.

In connection with the foregoing, the Ninth Circuit stated that as an Indian tribe, Paiute-Shoshone "is possessed of sovereign immunity which bars execution of the warrant" against the tribe and tribal property (Pet. App. 24a; J.A. 160). The court of appeals also stated that neither the District Attorney nor the Sheriff was entitled to qualified immunity because "as a matter of law a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction." Pet. App. 7a; J.A. 179.

D. *Nevada V. Hicks* Not Addressed In Reversal

The County, District Attorney McDowell and Sheriff Lucas filed their answering brief with the court of appeals on June 21, 2001. At that time, this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) ("*Hicks*") had not been issued. The *Hicks* decision was issued four days later, however, on June 25, 2001. In that decision, this Court stated:

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [including search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even

> when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government. *Id.* at 363, 364.

The *Hicks* decision was brought to the attention of the Ninth Circuit before oral argument was held, and Paiute-Shoshone addressed the *Hicks* decision in its reply brief. The County, District Attorney and Sheriff also presented the *Hicks* decision to the Ninth Circuit during oral argument in October 2001.

In its original opinion issued January 4, 2002, however, the Ninth Circuit omitted any discussion of or reference to *Hicks*.

The County, District Attorney, and Sheriff again presented and extensively briefed the *Hicks* decision and its preceding line of cases (*Kagama, Oliphant, Wheeler,* and *Montana*) to the Ninth Circuit in a petition for rehearing *en banc*. Once again, however, in its order denying the petition for rehearing *en banc*, and amending its original opinion in other areas, the Ninth Circuit declined to address, or even mention, this Court's decision in *Hicks*. Pet. App. 1a-8a; J.A. 174-179.

SUMMARY OF THE ARGUMENT

1. The core question before this Court is whether the execution of the March 23, 2000 search warrant violated Paiute-Shoshone's claimed "sovereign immunity." The alleged violation of that immunity provided the basis for the Ninth Circuit's conclusion that, even though the search and seizure was pursuant to a search warrant issued upon probable cause, the search and seizure nonetheless constituted a

violation of the Fourth Amendment. The grounds for the court of appeals' view that the execution of the search warrant violated the tribe's sovereign immunity vacillated between reliance on the interest-balancing test attendant to application of the principles of *Williams v. Lee*, 358 U.S. 217 (1959) ("*Williams*"), and invocation of a tribe's immunity from unconsented civil suit. The court ultimately conflated the two doctrines. While the doctrines are separate and might best be considered separately, it matters not whether they are considered jointly or separately; for the correct analysis of both doctrines leads to the same conclusion: Neither the retained inherent sovereignty of the tribe (under the *Williams v. Lee* interest-balancing principles), nor the sovereign immunity of the tribe (immunity from unconsented suit), has been violated.

a. This Court recognized in *Williams* that, absent governing Acts of Congress, application of a state law to a tribe or its members is not permitted where "the right of the Indians to govern themselves" is infringed upon. 358 U.S. at 271. Determination of whether impermissible infringement has occurred requires an identification and, if necessary, a balancing of affected federal, state and tribal interests. The required analysis in this case, however, is simplified greatly by virtue of this Court's subsequent decisions in *Montana* (the pathmarking case on the subject of tribal civil authority over the conduct of nonmembers – such as the law enforcement officers here), and this Court's recent decision in *Hicks* where, under strikingly similar facts, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" 533 U.S. at 364.

b. The court of appeals' reliance on notions of tribal sovereign immunity from suit also missed the mark widely. Tribal sovereign immunity is immunity from civil suit. There is no precedent by this Court that holds or even intimates that this Court's judicially established doctrine of sovereign immunity from civil suit was originally intended, or should now be extended, to include immunity from state criminal process. Indeed, a contrary conclusion would raise grave questions under the Tenth Amendment because of interference with California's inherent police powers with respect to controlling unlawful conduct occurring outside of Indian country.

The search warrant here was not even directed to the tribe or to any official of the tribe in his or her official capacity. It was instead directed "to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo." The warrant did not require Paiute-Shoshone to affirmatively do anything, but instead "commanded" the therein described law enforcement officers to conduct a search for specified items and to seize them if found. In contrast to all prior decisions from this Court applying the tribal sovereign immunity doctrine, Paiute-Shoshone was not being haled coercively into court for the purpose of claimed civil liability for monetary damages or for injunctive or other relief being sought by a suing plaintiff.

In view of the doubts expressed by this Court in *Kiowa Tribe* as to the tribal sovereign immunity doctrine's efficacy generally, even with respect to civil lawsuits, that doctrine should not be expanded judicially to reach state process outside its previously settled reach pertaining to civil lawsuits and the efforts by suing plaintiffs to hold tribes accountable for monetary damages or injunctive or other already-proscribed relief.

2. The court of appeals found that tribal governments, as sovereign government bodies, may themselves maintain a civil action under 42 U.S.C. § 1983.[7] The court of appeals erred for two reasons. First, § 1983 provides a remedy to "any citizen of the United States or other person within the jurisdiction thereof" who is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" by any person acting under color of state law. Tribal government bodies are neither "citizens" of the United States, nor "other persons" as described in the statute. In the latter regard, this Court has held that the term "person" in federal statutes presumptively does not include sovereigns. This presumption may be disregarded only upon affirmative showing of statutory intent to the contrary. There is none with respect to § 1983.

Second, in order to bring an action under § 1983, a plaintiff must not only be a "citizen" or "other person" within the meaning of the statute, but must also have a constitutional or federal statutory right subject to protection under the statute. The sovereign rights of an Indian tribe, however, are not such rights. They are not secured to the tribes by the constitution; and there is no federal statute that provides the tribes with such rights. Those rights instead arise from this Court's decisional law or from treaty.

3. District Attorney McDowell and Sheriff Lucas are entitled to qualified immunity with respect to the 42 U.S.C. § 1983 claim, and any other retroactive relief, regardless of how the first two questions are answered. The

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[7] There is no issue here involved as to whether individual Indians whose Constitutional or federal statutory rights have been violated may maintain an action under 43 U.S.C. § 1983; individual Indian tribal members clearly may maintain such an action.

determination on qualified immunity must be made with reference to whether, at the time the warrant was executed, it was clearly established law that the warrant's execution infringed upon Paiute-Shoshone's sovereign immunity. The *Hicks* decision, although issued some fifteen months later, controls with respect to the retained sovereignty/sovereign immunity analysis and the state of the law at the time the warrant was executed. The authority relied upon by the Ninth Circuit for the contrary is inapposite. In particular, *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) ("*James*"), involved a subpoena served by a criminal defendant in a federal criminal proceeding under the Major Crimes Act, and did not consider the question whether state officers may execute a search warrant on tribal property only at the pleasure of the tribe.

ARGUMENT

The opinion of the Ninth Circuit in this case establishes at least hundreds, and likely many more, Indian tribal enclaves that are now sanctuaries where evidence and proceeds of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officers who are investigating the violation of off-reservation state crimes, even when those law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

These enclaves include tribal commercial gambling casinos, which are proliferating throughout the nation, and which are generating billions of dollars in revenue, much of which is in cash,[8] as well as other tribal owned businesses

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[8] According to its Website, even Harrah's Entertainment, Inc., a major corporation traded on the New York Stock Exchange, now

such as resorts, hotels,[9] golf courses,[10] motorcycle/motocross parks of hundreds of acres themselves, recreational vehicle parks, ski resorts, manufacturing and distribution facilities where consumer products – such as bottled water plants – are operating, and the offices of Indian tribal agencies and other tribal offices and properties of all types.

There are currently over 560 federally recognized Indian tribes in the nation. *Indian Entities Recognized and*

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operates large Indian gambling casinos and resorts on Indian reservations in the Ninth Circuit, as well as elsewhere in the nation. See <http://harrahs.com/our_casinos/index.html>. The National Indian Gaming Commission reports that in 2001 Indian gaming generated 12.7 billion dollars in revenue. See <http://www.nigc.gov>.

[9] According to the San Diego Union-Tribune, October 3, 2002, page 1, the Viejas Indian Band of San Diego County, California, along with 3 other tribes, are in the process of building a $43,000,000.00 Marriott Residence Inn in Washington, D.C., only a few blocks from the Capital. See also the Viejas website, <http://www.viejas.com>.

[10] The Sycuan Band of Indians (consisting of 66 enrolled tribal members, according to the *2002 Field Directory of the California Indian Community, Department of Housing and Community Development, State of California, Revised March 2002*), of San Diego County, California, has recently purchased the well-known Singing Hills golf course and resort in San Diego County, to go along with its gaming resort and other businesses. It is now known as the Singing Hills Resort at Sycuan, and according to Sycuan, it "includes more than 425 acres of lush, picturesque mountain terrain, and offers guests two 18-hole championship courses, a challenging par-3 course" and other resort accommodations, to accompany its large gambling operation and resort hotel. See <http://www.sycuan.com>.

Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). The number is increasing. In California alone, there are now over 100 tribes, some with as few as four or five members, and several having between seven and thirteen members. *2002 Field Directory of the California Indian Community, Department of Housing and Community Development, State of California, Revised March 2002*. The California tribes alone occupy over one million acres of territory. *Id.* According to information provided by the State of California, et. al. in their *Amici Curiae* brief herein, there are 398 Indian tribes within the states of the Ninth Circuit, occupying approximately 36 million acres of territory. All of these tribes and their tribal properties are, at least in the Ninth Circuit, now enclaves immune from search, even pursuant to a search warrant issued upon probable cause.

If the decision of the Ninth Circuit is allowed to stand on a nationwide basis, it will establish and confirm thousands of enclaves for the sanctuary of evidence, as well as sanctuaries for the proceeds and perpetrators of off-reservation state crime, immune from search, seizure and apparently arrest, until, and if and only if, the Indian tribe upon whose property the evidence, proceeds of crime or criminals reside decides to allow law enforcement officials access. One can only imagine the effect of such a state of affairs.

What if the recent Washington D.C. area sniper suspects had taken refuge in a tribal hotel or casino? What if a solo or serial murderer or rapist, child molester, money launderer, drug dealer, or other perpetrator of state crime seeks refuge for himself or the bounty or evidence of his crime in tribal hotels, resorts, or casinos, or within the acreage of tribal casinos or tribal motocross, RV, or other

parks? State search and arrest warrants will be meaningless and useless in the search for the suspects, and in searching for the bounty, evidence and instrumentalities of the crimes – making state sovereignty and state law enforcement activities regarding investigation and prosecution of off-reservation state crimes against our citizens subject to the approval of a multitude of various tribal governments, and further subject to the changing desires and views of tribal members who constitute tribal governments, tribal officials, or designated representative.

What if tribal government allowed access, but conditioned access (that is, regulated the performance of law enforcement officers in performing law enforcement duties) only upon certain tribal-dictated conditions – such as allowing only an unsafe and limited number or type of law enforcement officers onto the hotel or resort or other business or tribal property, and only at specified times, with only specified protective gear or weapons, or no protective gear or weapons, so as not to disturb guests, as the tribe deemed appropriate? Might the suspects slip away during "negotiations" between tribal personnel and law enforcement officials, and escape investigation and prosecution, or worse, continue committing crimes? What if the appropriate tribal personnel were not available to decide on whether to give consent to the search – yet a search warrant was in hand? What if there was intra-tribal dispute as to who had final authority to give consent to the search or whether there was in fact authorized consent?

The court of appeals' decision thus threatens to interfere, enormously, with the orderly investigation and prosecution of criminal conduct by states. It does so on the basis of reasoning that cannot be squared with this Court's Indian law jurisprudence or its precedents applying 42 U.S.C. § 1983.

I. NEITHER THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY NOR THE PRINCIPLE OF RETAINED TRIBAL SOVEREIGNTY ENABLES TRIBES AND THEIR ENTITIES TO PROHIBIT OR OTHERWISE REGULATE STATE OFFICERS IN EXECUTING PROCESS RELATED TO THE OFF-RESERVATION VIOLATION OF STATE LAW

The primary question presented concerns whether the doctrine of tribal sovereign immunity, or the principle of retained inherent tribal sovereignty, enables Indian tribes and their gambling casinos and other tribal businesses to prohibit searches of their property for criminal evidence of off-reservation state crimes, when the search is by state law enforcement officers pursuant to a search warrant issued on probable cause.[11] The answer to this question, based upon this Court's prior analysis and findings in *Hicks*, and this Court's earlier decisions in *Oliphant, Wheeler, Montana, Strate* and *Atkinson* leading to *Hicks*, is no – there is no tribal authority to regulate state officers in executing state process, be it a search warrant issued upon probable cause or other

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[11] The court of appeals referred to Public Law 280 throughout its decision. However, Public Law 280 does not apply in this case, in that Public Law 280 applies to crimes committed "by or against Indians" in the Indian country. See also, *Hicks*, 533 U.S. at 365 (Public Law 280 is limited to "crimes on a reservation"). However, to the extent that the decision or analysis by the Supreme Court in this case is also applicable to the execution of state process arising from and related to the investigation or prosecution of on-reservation state crime under Public Law 280, the propriety of execution of a search warrant or other process for on-reservation state crime could also be answered.

lawful state process related to the off-reservation violation of state law.

The core question before this Court is, of course, whether the execution of the March 23, 2000 search warrant violated the tribe's "sovereign immunity." *See* Pet. App. 24a. The alleged violation of that immunity provided the basis for the Ninth Circuit's conclusion that, even though the search and seizure was pursuant to a search warrant issued upon probable cause, the search and seizure nonetheless constituted a violation of the Fourth Amendment. Pet. App. 6a; J.A. 177-178. The grounds for the court of appeals' view that the execution of the search warrant violated the tribe's sovereign immunity vacillated between reliance on the interest-balancing test attendant to application of the principles of *Williams v. Lee*, 358 U.S. 217 (1959) (Pet. App. 16a, 20a), and invocation of a tribe's immunity from unconsented civil suit (*id.* 20a-21a). The court ultimately conflated the two doctrines. *Id.* 22a-23a. While the doctrines are separate and might best be considered separately, it matters not whether they are considered jointly or separately; for the correct analysis of both doctrines leads to the same conclusion: Neither the retained inherent sovereignty of the tribe (under the *Williams v. Lee* interest-balancing principles), nor the sovereign immunity of the tribe (immunity from unconsented suit), has been violated.

A. Indian tribes and their entities do not possess retained inherent sovereignty to prohibit the execution of process relating to off-reservation violations of state law

This Court recognized in *Williams* that, absent governing Acts of Congress, application of a state law to a tribe or its members is not permitted where "the right of the Indians to govern themselves" is infringed upon. 358 U.S. at 271; *see, e.g., Nevada v. Hicks*, 533 U.S. at 361; and *Strate v. A-1 Contractors*, 520 U.S. at 459. Where state law might infringe on a tribe's conduct, a determination of whether impermissible infringement has occurred requires identification and, if necessary, balancing of affected federal, state and tribal interests. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980) ("*Colville*"). As the decisions in *Strate* and *Hicks* also indicate by their use of the *Williams* standard, the scope of state authority is often related directly to whether the challenged action involves activity over which a tribe may exercise jurisdiction by virtue of its inherent authority. That activity here is the execution of a search warrant by a state or county officer issued by a state court with respect to investigation of an off-reservation crime. It is therefore, respectfully, appropriate to begin analysis of the *Williams* infringement issue with a brief review of this Court's jurisprudence dealing with inherent tribal authority.

As explained by this Court in *Wheeler*, Indian tribes are "no longer 'possessed of the full attributes of sovereignty'" (435 U.S. at 323, quoting *United States v. Kagama*, supra, 118 U.S. at 361). The sovereignty that Indian tribes retain "is of a unique and limited character" (*Id.* at 323), and "by virtue of their dependent status" tribes have

been divested of sovereignty in areas "involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* 326. An Indian tribe's powers of self-government "involve only the relations among members of the tribe." *Id.* at 326.

The principles of *Williams, Colville* and *Wheeler* were further advanced in *Montana v. United States,* 450 U.S. 544 (1981), which this Court has since recognized as the "pathmarking case" on the subject of tribal regulatory authority over the conduct of nonmembers – such as the law enforcement officers here. *Strate*, 520 U.S. at 445. In *Strate*, Justice Ginsburg, writing for a unanimous Court, explained that the Court in *Montana* had said that its decision in *Oliphant* (435 U.S. 191) holding that Indian tribes lacked criminal jurisdiction over non-Indians (*Id.* 211-212) rested on principles that support a more "general proposition," and that "In the main...'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – "do not extend to the activities of nonmembers of the tribe." *Strate*, 520 U.S. at 445-446. The Court in *Montana* did, however, add that there are two exceptions to this general proposition (that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe). These two exceptions are, first, that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some *direct* effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate, Id.* 446 (quoting from *Montana* at 565-566 (italics added)).

The character of *Montana* as being the pathmarking case was further explained four years later, in 2001, when Justice Souter in a concurring opinion in *Atkinson* (532 U.S. 645), in which Justices Kennedy and Thomas joined, stated that "If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana* v. *United States*, 450 U. S. 544 (1981)" (*Atkinson*, 532 U.S. at 659). Justice Souter then acknowledged the general proposition of *Montana* as being that "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Id.*, at 565" and that this "general proposition is...the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe." *Atkinson*, 532 U.S. at 560.

Just four weeks after this Court's decision in *Atkinson* the Court released its decision in *Hicks*. 533 U.S. 353. In *Hicks*, under strikingly similar facts to this case, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" 533 U.S. at 364.

The only distinction between *Hicks* and this case lies in the fact that the location searched and the property seized belonged to a tribe or a tribal corporation. This distinction does not assist Paiute-Shoshone here because, first, this Court has not distinguished between tribal members and tribes for interest-balancing purposes. Thus, in *Colville*, the Court applied the interest-balancing test in determining the validity of a state's regulation of retail smokeshops operated by several tribes. 447 U.S. at 147; *see also California v.*

Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987)

Further, in *Hicks*, this Court has already performed an interest balancing test regarding a state's right to serve process on the reservation, and in so doing, acknowledged that states have "inherent jurisdiction on reservations" (*Hicks,* 533 U.S. at 365), and that "Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian fee-land) to investigate or prosecute violations of state law occurring off the reservation." *Hicks*, 533 U.S. at 366. The conclusion reached by this Court in *Hicks*, and a finding leading to that conclusion, are:

> While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian fee lands) for enforcement purposes, several of our opinions point in that direction . . . .
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> * * * *
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> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of

> federal law impairs state government. *Hicks*, at 364. [12]

The finding by the Court that "the State's interest in execution of process is considerable" (*Hicks*, at 364) is consistent with the prior findings of this Court that in our federal system, it is well established that "The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Engle v. Isaac*, 456 U.S. 107, 128 (1981).

In addition to all of the foregoing, the acknowledgement by this Court in *Hicks* that the states have inherent jurisdiction on reservations (*Hicks*, 533 U.S. at 365) is consistent with the principles of federalism and states' rights that existed and served as the premise for the states joining the Union in the first place. All states entered the Union with their sovereignty intact. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991). "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n. 2 (1985); *accord Edelman v. Jordan*, 415 U.S. 651, 660 (1974). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, at 260 (James Madison) (Clinton Rossiter ed. 1961). Further, as is provided by the Tenth Amendment to the Constitution: "The powers not

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[12] The Ninth Circuit's decision below held to the contrary, concluding explicitly "that the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" Pet. App. 20a.

delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Accordingly, in that a reservation is part of the state in which it lies (*New York ex rel. Ray v. Martin*, 326 U.S. 496 (1945); *Draper v. United States*, 164 U.S. 240 (1896), and because the states have never ceded their police power to the federal government in the constitution, nor are they prohibited by the constitution from exercising such power, the exercise of inherent state police power by executing process on the reservation, relating to off-reservation state crime, is a valid exercise of the states' retained and inherent police power.

B. The doctrine of tribal sovereign immunity does not enable tribes and their entities to prohibit the execution of process relating to off-reservation violations of state law

The court of appeals' reliance on notions of tribal sovereign immunity from suit also missed the mark widely. Tribal sovereign immunity is immunity from civil suit. *See, e.g.,. Turner v. United States*, 248 U.S. 354, 357-358 (1919); *United States v. United States Fidelity & Guaranty Co. et al.*, 309 U.S. 506, 513 (1940); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759-760 (1998) ("*Kiowa Tribe*"). There is no precedent by this Court that holds, or even intimates, that this Court's judicially established doctrine of tribal sovereign immunity from civil suit is or should be extended to include immunity from state criminal process. In fact, the continued viability of that doctrine in even its traditional and customary role (of immunity from civil lawsuit) has been seriously questioned by this Court, in light of the entrance of and participation by tribes and their businesses in the nation's commerce, in a

manner clearly not contemplated at the time of the tribal sovereign immunity doctrine's original creation. *Kiowa Tribe*, 523 U.S. at 757-758 ("There are reasons to doubt the wisdom of perpetuating the doctrine...In our interdependent and mobile society, however, tribal immunity [already] extends beyond what is needed to safeguard tribal self-government.")

Indeed, the very doctrine of tribal sovereign immunity from suit was created "almost by accident." *Kiowa Tribe, Id.* at 756. The case upon which the doctrine relies for its existence, *Turner* (248 U.S.354) has recently been described by this Court as "but a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa Tribe supra,* page 757.

The Ninth Circuit also erroneously employed the doctrine of tribal sovereign immunity from suit in a manner that infringes on the retained sovereign rights of the states. When states joined the Union, they joined as complete sovereigns themselves, and gave up to the constitution and federal government only the enumerated powers set forth in the constitution. U.S. Constitution, Amendment X; *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Thus, the states have the sovereign right to exercise their police power, and possess their own inherent sovereign right to repel others (here the tribe) who seek to limit or restrict the state in its exercise or those police powers, e.g., with respect to the enforcement and prosecution of violations of state criminal laws occurring off-reservation. State police power – the "sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people" (*Allied Structural Steel v. Spannus*, 438 U.S. 234, 241 (1978)), has never been ceded to the

federal government, and certainly not to the tribe. Accordingly (and in accordance with what this Court has already acknowledged in *Hicks*, 533 U.S. at 365), states continue to possess the sovereign right to exercise that sovereign power. This is a result of the constitutional bargain and relationship between the states and the federal government. It is a constitutional doctrine, founded in our federalism form of government. Under our federal system, it is the states – not the federal government – and not the tribes, which are domestic dependent sovereigns having a relationship to the federal government similar to that of a ward to his guardian (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) – which "possess primary authority for defining and enforcing the criminal law" in this country. *Brecht v. Abrahamson*, *supra*, 507 U.S. at 635; *Engle v. Isaac*, *supra*, 456 U.S. at 128.

Additionally, here, the search warrant was not even directed to the tribe or to any official of the tribe in his or her official capacity. It was instead directed "to any sheriff, constable, marshal, police officer, or to any other peace officer in the County of Inyo." ER 138-141. The warrant did not require Paiute-Shoshone to affirmatively do anything, but instead "commanded" the therein described law enforcement officers to conduct a search for specified items and to seize them if found. *Id.* In contrast to all prior decisions from this Court applying the tribal sovereign immunity doctrine, Paiute-Shoshone was not being haled coercively into court for the purpose of being required to respond to a claim of civil liability for monetary damages or for injunctive or other relief being sought by a suing plaintiff.

In view of the doubts expressed by this Court in *Kiowa Tribe* as to the tribal sovereign immunity doctrine's efficacy generally, even with respect to civil lawsuits, the doctrine

should not be expanded judicially to reach state criminal process or any other process outside its previously settled reach pertaining to civil lawsuits.

II. THE TRIBE MAY NOT MAINTAIN AN ACTION UNDER 42 U.S.C. § 1983 BECAUSE THE TRIBE IS NEITHER A CITIZEN OF THE UNITED STATES, NOR A "PERSON" WITHIN THE MEANING OF THAT TERM AS USED IN THE STATUTE, AND BECAUSE THE ALLEGED RIGHT THAT WAS VIOLATED WILL NOT SUPPORT THE ACTION

A. The tribe is neither a citizen of the United States, nor an "other person" within the meaning of that term as used in the statute

The court of appeals found that tribal governments, as sovereigns, may themselves maintain a civil action under 42 U.S.C. § 1983.[13] Pet. App. 6a; J.A. 177-178. The court of appeals' ruling is incorrect, and this Court should, respectfully, address this matter and put it to rest.

First, § 1983 provides a remedy to "any citizen of the United States or other person within the jurisdiction thereof" who is deprived of "any rights, privileges, or immunities

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[13] There is no issue here involved as to whether individual Indians whose constitutional or federal statutory rights have been violated may maintain an action under 43 U.S.C. § 1983; the right of individual Indian tribal members to bring such an action is not being disputed - or at issue.

secured by the Constitution and laws" by any person acting under color of state law. Tribal government bodies are not citizens of the United States. See *Elk v. Wilkins*, 112 U.S. 94 (1884) ("Under the Constitution of the United States, as originally established...[t]he "Indian tribes being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit.") Thus, if tribal governments are to have any § 1983 rights to sue, the tribal government, as a sovereign in its own right, must somehow be held to be an "other person" as described in the statute.

Sovereigns, however, are not "other persons" as described in § 1983 for purposes of having rights to sue for alleged violations of constitutional or federal statutory rights. *Vermont Agency of Natural Res. v. United States ex re. Stevens*, 529 U.S. 765, 780-(2000) (there is a "longstanding interpretive presumption that 'person' does not include the sovereign" and this presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary."); *Will v. Michigan Dep't of State Police*, 491 U.S. 63 (1989) (states, as sovereigns, as well as state officials, are not "persons" for purposes of being sued as the term "person" is intended in 42 U.S. § 1983). In *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir.1976), the Court held that a municipality is not an "other person" entitled to bring suit under § 1983; relying on the ruling in *Monroe v. Pape*, 365 U.S. 167 (1961), that a municipality is not a "person" for purposes of being sued under § 1983, and on the fact that Congress' purpose in passing § 1983 was to create a federal remedy for private parties, not government bodies.

Although *Monroe v. Pape* was partially overturned in *Monell v. Department of Social Services*, 436 U.S. 658

(1978), where this Court held that, under certain circumstances, municipalities could be liable as "persons" under § 1983, it did not affect the conclusion in *City of Safe Harbor* that governmental entities could not sue under § 1983. *See Rockford Board of Education v. Illinois State Bd of Education*, 150 F.3d 686, 688 (7th Cir.1998) (" a city or other municipality cannot bring suit under" § 1983) (dictum); *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), cert. denied, 479 U.S. 1085 (1987); *Randolph County v. Alabama Power Co.*, 784 F.2d 1067 (11th Cir.), modified, 798 F.2d 425 (11th Cir.1986), cert. denied 479 U.S. 1032 (1987); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied 449 U.S. 1015 (1980). "These courts reasoned that *Monell's* holding that municipal entities may be proper § 1983 defendants does not render them proper § 1983 plaintiffs. These courts further noted that *City of Safety Harbor's* reliance on congressional intent remains valid after *Monell*. These opinions also rely on the Supreme Court authority discussed above holding that a municipality may not seek relief under the Fourteenth Amendment. *See Coleman v. Miller*, 307 U.S. 433, 441 (1939). See also *Illinois v. City of Chicago*, 137 F.3d 474 (7th Cir.1998) (state is not a "person" entitled to sue under § 1983)." *City of New Rochelle v. Town of Mamaroneck*, 111 F.Supp.2d 353, 368.

This view is even taken by other panels of the Ninth Circuit. In *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1092, 1096-1097 (9th Cir. 2002), the Ninth Circuit cited with approval the opinion by Judge Betty Fletcher regarding the rights of a tribe to bring a § 1983 action in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16, (9th Cir 1987). The *White Mountain Apache Tribe v. Williams* opinion of Judge Fletcher (dissenting on other grounds) is as follows:

However, it is doubtful whether the Tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under section 1983 for deprivation of its rights, privileges, or immunities. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1253-55 (5th Cir.1976) (municipality is not a "person" entitled to bring section 1983 action); *Buda v. Saxbe,* 406 F.Supp. 399, 403 (E.D.Tenn.1974) (a "state is not a '... citizen of the United States or other person within the jurisdiction thereof ...' within the contemplation of 42 U.S.C. § 1983."); *Spence v. Boston Edison Co.,* 390 Mass. 604, 459 N.E.2d 80, 83-84 (1983) (city housing authority cannot bring section 1983 action to enforce due process or equal protection rights); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.) (" '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."), *cert. denied,* 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980). *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir 1987).

Accordingly, the tribe, as a sovereign and in its sovereign capacity (which is clearly the capacity in which it brings this suit and asserts sovereign immunity) is not a citizen or other person within the meaning of 42 U.S.C. § 1983, and therefore it does not qualify as a "citizen" or "other person" eligible to bring an action under 42 U.S.C. § 1983.

B There has been no violation of any constitutional or federal statutory rights actionable under 42 U.S.C. § 1983

The rights of the tribe allegedly violated – the right to self governance, and the right to tribal sovereign immunity – are not constitutional or federal statutory rights, and thus any violation of them would not support a cause of action under 42 U.S.C. § 1983. Stated differently, neither the claimed right to regulate or prohibit state law enforcement officers in executing a search warrant relating to off-reservation violations of state law, nor the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are constitutional or federal statutory rights. As such, they cannot support a § 1983 claim.

The Ninth Circuit has already acknowledged this in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), where the Ninth Circuit holds that interfering with or impairing an Indian tribe's right to self-governance is *not* a protected interest under § 1983, and will not support a claim for § 1983 damages. This is, again, because a tribal right to self-governance is not based upon constitutional or federal statutory law. *Id.* at 662-663.

The Ninth Circuit attempts, however, in its opinion below, to "bootstrap" the service of the search warrant into a "Fourth Amendment violation" that in turn will support a § 1983 claim. It does this by asserting that since the search was unlawful in the first instance as a violation of tribal sovereign immunity – which itself will not support a § 1983 claim, it was an unlawful search, and therefore in the second instance becomes a Fourth Amendment violation.

The Ninth Circuit's attempt to find a Fourth Amendment violation to the tribe, even when the search is pursuant to a search warrant issued upon probable cause, by first finding that the tribe had a judicially-determined sovereign right to be free from any search at all, does not elevate the search, even if found to be subject to bar by the tribe, to a Fourth Amendment violation. Simply put, the core federal right allegedly offended here is Paiute-Shoshone's sovereign immunity or sovereignty – not their entitlement, if any, to be free from unreasonable searches and seizures. The panel's approach was, respectfully, nothing more that an attempt to escape the prior holding in *Hoopa Valley Tribe* and its binding nature as prior circuit authority.

Additionally, even if this Court was to accept the Ninth Circuit's analysis of the conversion of a violation of a sovereign tribal government right into a Fourth Amendment violation, there can be no § 1983 action on this account. This is because it is well established that in order to prevail in a § 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The conversion of a violation of a tribal government sovereign right was not, at the time of the execution of the warrant, a "clearly established statutory or constitutional right of which a reasonable person would have known."

Finally, there simply is no prior authority for finding that the sovereign government of a tribe is included within the concept and meaning of "the people" as that term is used in the Fourth Amendment, or "person" as that term is used in the Fourteenth Amendment. Consequently, a constitutional violation arising from violation of a tribal right of

sovereignty, even if it is held to have occurred here, was not a "clearly established statutory or constitutional right of which a reasonable person would have known."

III. IN THE EVENT THAT QUESTIONS PRESENTED 1 AND 2 ARE ANSWERED IN A MANNER HOLDING THAT THE TRIBE WAS ENTITLED TO PROHIBIT THE SEARCH, THE DISTRICT ATTORNEY AND THE SHERIFF ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE, AT THE TIME OF THE EXECUTION OF THE WARRANT, THE LAW REGARDING EXECUTION OF SEARCH WARRANTS ON TRIBAL PROPERTY WAS NOT CLEARLY ESTABLISHED

District Attorney McDowell and Sheriff Lucas are entitled to qualified immunity with respect to the 42 U.S.C. § 1983 claim and any other retroactive relief regardless of how the first two questions are answered. The determination on qualified immunity must be made with reference to whether the warrant's execution infringed upon Paiute-Shoshone's sovereign immunity, or retained inherent sovereignty, and the analysis set forth above regarding the first and second questions presented establishes that, at the time of the challenged search and seizure, no settled authority foreclosed the District Attorney and Sheriff from effecting execution of the warrant. The *Hicks* decision, although issued some fifteen months later, is particularly telling with respect to the retained sovereignty/sovereign immunity analysis and the state of the law at the time the warrant was issued.

As this Court acknowledged in *Hicks*, even at the time of that decision's issuance in June 2001, it was "not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation...for enforcement purposes." 533 U.S. at 363. However, as the Court further stated "... several of our decisions point in that direction." *Id.* at 363. The Court then went on, of course, in *Hicks* to find that state officers *did have* authority to execute process – search warrants – on the reservation, which related to off-reservation violations of state law. *Hicks, Id.* at 364-365.

Additionally, because the *Hicks* decision was predicated on then-established precedent, and because that precedent drew no distinction between tribal and tribal-member owned premises or property, there was no clearly established law such that any reasonable officer would have known – even if the Court so establishes in this case – that the execution of a state search warrant on the reservation as to tribal property was prohibited and constituted a violation of constitutional or federal statutory rights. Indeed, a prior circuit decision — *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) — had rejected explicitly the contention that violation of tribal self-government rights could form the basis for § 1983 liability.

The district court's decision in *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498 (S.D. Cal. 1992), *aff'd on other grounds*, 54 F.3d 535 (9th Cir. 1995), adds nothing in this regard, since it involved execution of a search warrant with respect to on-reservation gaming activities at a time when only the federal government had the right, under 18 U.S.C. § 1166, to enforce state gaming laws on the reservation. Thus, the reason that execution of the state search warrant in *Sycuan* was outside of the jurisdiction

of county officers was because only the federal government had the right – the jurisdiction – to enforce state gaming laws on the reservation at that time. The federal statute, 18 U.S.C. § 1166, had thus preempted state authority to enforce state gaming law on the reservation. Such is not the case here.

The Ninth Circuit authority relied upon by the court below, with respect to tribal immunity from suit, was also not dispositive: *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), involved a subpoena, not a search warrant. It also involved the federal government prosecuting under the Major Crimes Act, and not the state investigating pursuant to its inherent and sovereign right to exercise its own police power. *James* thus did not address the question of whether a state search warrant's execution, which does not require any response by the party whose property is searched or seized, and which is an exercise of state sovereign police power, violates claimed tribal sovereign immunity.

The following cases further show that even if it is held that there was § 1983 cognizable violation of a tribe's right to self-governance or tribal sovereign immunity to be free from search, and that execution of the warrant violated that right, such right was not so clearly established so as to deny the defense of qualified immunity. Thus, while the service of a FRCRP Rule 17 subpoena by a defendant to his alleged rape victim was quashed in *James* as being in violation of the tribe's sovereign immunity, a district court in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, refused to follow *James*, finding that the constitutional rights of the accused were not considered in *James*, and that the constitutional rights of the accused outweighed the tribe's claim of sovereign immunity in the counseling records (the subpoena was not quashed). Moreover, in *United States v. Verlarde,* 40 F.Supp.2d 1314

(D. N. M. 1999), once again under almost identical circumstances as *James*, the court again went through an extensive analysis of *James,* and *Snowden*, and found that the constitutional rights of the accused, and the federal government's overriding sovereign authority, "trumped" the tribe's claim of sovereign immunity in the counseling records, and once again the subpoena was not quashed. These district court decisions stand for the general proposition that, even with respect to subpoenas, a tribe's sovereign immunity was not absolute but had to be balanced against competing interests. Here, California had a similar weighty interest in enforcing its criminal laws with respect to off-reservation conduct – as *Hicks* made clear.

All of the above cases, leading to inconsistent results, were similar in that they all involved violations of criminal law occurring on the reservation. None concerned, as does this case, the off-reservation violation of state law, and the effect of the state's sovereignty, and exercise of the state's police power, on the right (or lack thereof) to execute process relating to the off-reservation violation of state law.

Under these varied circumstances, it respectfully and simply cannot be said that all reasonable officers would have known that obtaining and/or execution of a search warrant, issued by a magistrate on probable cause, was unlawful under the circumstances alleged.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY,
PHIL MCDOWELL, Individually and as District Attorney,
DAN LUCAS, Individually and as Sheriff,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY
OF THE BISHOP COLONY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Where Congress has not authorized states to issue or execute search warrants on Indian tribal governments or their property, does a County and its officials have authority to execute a search warrant issued by a state court and seize an Indian tribal government's property—confidential employee personnel records—on its reservation?

2. Whether the Tribe has a cause of action for compensation from the County and its officials under 42 U.S.C. § 1983 for violation of its rights under federal law?

3. Whether the County sheriff and district attorney who executed the search warrant are entitled to qualified immunity under 42 U.S.C. § 1983?

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IN THE

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No. 02-281

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY,
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v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. Statement of Facts

In February 2000, the Bishop Paiute Tribe (hereinafter "Tribe") received a written demand from the Inyo County district attorney for payroll records covering three employees in its gaming enterprise, all tribal members, in connection with an investigation of possible welfare fraud. The Tribe's attorney responded by letter to the district attorney that the Tribe's policies prohibit disclosing an employee's personnel

information without the written consent of the employee. J.A. 103.[1] The County did not respond to this letter in any manner.

On March 23, 2000 the Inyo County sheriff and district attorney, acting under a search warrant issued by the California Superior Court, forcibly entered restricted areas of the Bishop Paiute Tribe's gaming enterprise. Using deadbolt cutters, the sheriff and district attorney cut the locks and seized the Tribe's confidential employee personnel records, ignoring the Tribe's policies and despite the protests of tribal officials that the Tribe is not subject to state jurisdiction. J.A. 104.[2] These records consisted of time card entries, payroll registers, payroll check registers and quarterly payroll tax information for the three employees who were named in the warrant, as well as the same information for 78 other tribal employees.

The district attorney and sheriff did not allow the Tribe to remove the names and information regarding the 78 employees whose records were not within the terms of the search warrant, thereby substantially exceeding the scope of the warrant. J.A. 104. County officials later realized that the allegations of welfare fraud had been based on their simple

[1] Since this case involves a motion to dismiss granted by the district court, the Court should accept all allegations in the Tribe's Complaint as true, *e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993), and construe them in the light most favorable to the Tribe. *Allen v. Wright*, 468 U.S. 737, 767 n.1 (1984) ("[b]ecause the District Court granted a motion to dismiss, we must accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party") (internal quotations and citations omitted).

[2] The County asserts that the Tribe had previously honored its requests for this kind of information. Brief for Petitioners at 6 n.2 (hereinafter "County Br."). The Tribe does not believe this is so. Disclosure of confidential information by tribal employees would violate the Tribe's personnel policies and could lead to dismissal.

mathematical error, and dismissed all charges against the three employees "due to lack of probable cause." *See State v. Dewey*, No. MBCRF01-0027942-002 (Inyo Cty. 2000).

The Tribe is a federally recognized Indian tribe that beneficially owns all lands within its 875-acre Reservation in eastern California, which are held in trust for it by the United States.[3] The Tribe owns and operates a gaming enterprise on trust lands within its Reservation, known as the Paiute Palace Casino.[4] This enterprise employs about 140 persons, of whom approximately 80 percent are Native American, mostly tribal members. The enterprise provides the principal source of

[3] Reservations for this Tribe and other homeless Indians in eastern California were first established by Executive Order No. 1496 (1912), *reprinted in* III Kappler, Indian Affairs, Law and Treaties at 677-78. Pursuant to the Act of April 20, 1937, ch. 114, 50 Stat. 70, these reservation lands were exchanged for lands owned by the City of Los Angeles. The exchanged lands constitute the current Bishop Paiute Reservation and other Indian reservations in eastern California. The 1937 Act provides these lands "shall be held by the United States in trust for the Indian tribe, band, or group involved." The Bishop Paiute Tribe has approximately 1,200 members. About 950 tribal members and other Indians live on the Reservation.

[4] The Indian Gaming Regulatory Act requires that a tribe must "have the sole proprietary interest and responsibility for the conduct of any gaming activity," 25 U.S.C. § 2710(b)(2)(A), on Indians lands (except for a limited number of bingo facilities operating prior to the Act, *id.* § 2710(b)(4)(B)). The Tribe operates the gaming enterprise through a corporation which the Tribe chartered and wholly owns and controls. The Corporation is also a Respondent in this case. All parties, as well as the United States as *amicus curiae*, agree the Corporation is an arm of the Tribe, and shares its sovereign status. County Br. at 5 n. 1; Brief of United States as *Amicus Curiae* at 11-14 (hereinafter "United States Br."). *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753 (1998); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398-400 (1995); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n. 13 (1973); *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946).

employment and income for the Tribe's members, as well as the principal revenues the Tribe uses to fund governmental services on its Reservation.

Casino gaming by Indian tribes is authorized by and regulated under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, enacted by Congress in 1988 after this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). A primary purpose of IGRA is to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1);[5] *see also Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996).

IGRA requires any tribe conducting casino gaming on its reservation to enter into a bilateral compact with the State concerning the terms and conditions of that gaming. 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3); *see generally Seminole Tribe*, 517 U.S. at 47-49. The Tribe has entered into a Compact with California, which the Secretary of the Interior approved, 65 FED. REG. 31,189 (May 16, 2000), pursuant to IGRA. 25 U.S.C. § 2710(d)(3)(B). This Compact requires, *inter alia*, that the Tribe's gaming enterprise participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to its employees. J.A. 60. Pursuant to this Compact provision, the tribal enterprise provides state agencies regular information about its employees and their income. The Compact *does not* authorize state courts to issue search warrants on the Tribe or its gaming enterprise.

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[5] IGRA was also enacted "to shield [Indian gaming] . . . from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. §2702(2).

In July 2000, the district attorney once again requested personnel records, this time for six additional employees who are also tribal members. To avoid another confrontation, the Tribe offered to accommodate the district attorney's need for records in a manner that accorded with the Tribe's confidentiality policies and sovereign interests. Since in order to receive welfare a person must agree to permit review of any employment records by County officials, the Tribe proposed that it would release the records if the County would provide it with a copy of that portion of the signed welfare application submitted by each employee consenting to the County's review of employment records. Pet. App. 14a. The district attorney rejected this offer. Faced with the imminent threat of additional search warrants, the Tribe brought this action in federal district court.

B. Proceedings below

The Tribe's Complaint principally sought declaratory and injunctive relief against the County and its officers on the ground they had exceeded their jurisdiction, both because the warrant impermissibly interfered with the Tribe's sovereign immunity and its right to self-government as protected by federal law, and because neither Public Law 280, 18 U.S.C. § 1162, nor the Tribal-State Compact negotiated pursuant to IGRA conferred authority on the County to execute a search warrant on the Tribe.

The Tribe also sought compensatory damages pursuant to 42 U.S.C. § 1983 for violation of the Tribe's rights under the Fourth and Fourteenth Amendments and Indian Commerce Clause in the United States Constitution, its rights under federal law to self-government, and its rights under IGRA. The Tribe sought attorneys fees, costs, and expenses under 42 U.S.C. § 1988.

The district court granted the County's motion to dismiss three months after the Complaint was filed, without any

discovery or the introduction of any evidence except for several documents the court took judicial notice of. J.A. 120, 124-25. The district court held first that the County's search warrant was authorized under Public Law 280, J.A. 134-38, a position that the County has now abandoned, *see* County Br. at 25 n.11. The court recognized that the Tribe's claims of immunity "advance[] the Tribe's right to self-governance," J.A. 138, but nevertheless rejected the Tribe's contention that sovereign immunity barred execution of the warrant to seize tribal government property, principally because the district court believed that immunity would impinge on the State's "interest in a fair and uniform application of California's criminal law." J.A. 138. The court also held that nothing in IGRA eliminated the County's authority to search tribal government property. J.A. 138-39. The district court dismissed the Tribe's claim under Section 1983 against the County because it determined the district attorney and sheriff were acting as state officers and were thus immune from Section 1983 liability, J.A. 125-30, and against both officers because they had qualified immunity, J.A. 130-34.

The Tribe appealed. The Court of Appeals for the Ninth Circuit reversed the district court decision in all relevant respects. First, the court of appeals reversed dismissal of the Tribe's claims for declaratory and injunctive relief, holding that the County and its officials had violated the Tribe's sovereign immunity and its right under federal law to make its own laws and be ruled by them free from state interference. Noting that "[a]bsent a waiver of sovereign immunity, tribes are immune from processes of the court," J.A. 154, the Ninth Circuit determined that Public Law 280 did not authorize the warrant, because that Act "was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations," J.A. 152, and did not waive tribal sovereign immunity or grant states jurisdiction over tribes, J.A. 153-54 (citing *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976)). Finding no

other source of a waiver of the Tribe's immunity, the court of appeals concluded that sovereign immunity precluded the County's assertion of judicial jurisdiction over the Tribe. J.A. 154. The court of appeals rejected the County's argument that this Court's decisions construing the scope of tribal authority over non-Indians controlled the question presented here—whether the State could exercise authority over the Tribe itself and tribal property. J.A. 154-55.

The court of appeals also held that the search warrant violated "the more fundamental right of the Tribe not to have its policies undermined by the states and their subdivisions." J.A. 156 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). The Ninth Circuit found that "[t]he Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines." J.A. 155. The Ninth Circuit explained that "[t]he enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income." J.A. 159. Accordingly, the court of appeals held that execution of the search warrant interfered with "the right of reservation Indians to make their own laws and be ruled by them." J.A. 156 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The court of appeals also determined that the County and its officials had less intrusive means available to them to enforce state welfare laws:

> The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of

> the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer.

J.A. 161.

The court of appeals held that the district attorney and sheriff acted on behalf of the County and not the State for purposes of Section 1983 liability. J.A. 169-73. Petitioners have not sought review of that determination.

Finally, the court of appeals held that the County was liable for damages under Section 1983, J.A. 164-69, and that county officials were not entitled to qualified immunity, J.A. 174-79. Applying this Court's standards for qualified immunity, *see Saucier v. Katz*, 533 U.S. 194 (2001), the court of appeals first held that the Petitioners' obtaining and execution of the search warrant violated the Fourth Amendment because it exceeded the County's jurisdiction. The court then determined that the law was sufficiently clear that a reasonable County officer would have known that he had no jurisdiction to search and seize a Tribe's personnel records as part of a criminal investigation. J.A. 178-79. At no point in any of the proceedings below did anyone contest the Tribe's status as a "person" under Section 1983 or the Tribe's inclusion in the category of "people" protected by the Fourth Amendment. Accordingly, neither the district court nor the court of appeals addressed (or even mentioned) those issues.

The County's request for a rehearing *en banc* was denied. Pet. App. 8a. This Court then granted the petition for a writ of certiorari filed by the County and its individual officers.

SUMMARY OF ARGUMENT

I. It is "settled law" that tribes, as sovereign governments, are immune from judicial process unless the tribe or Congress waives the tribe's immunity. *E.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756 (1998). It is equally well-established that sovereign immunity protects governments from all forms of judicial proceedings—however styled—that would affect their property interests, including in rem actions. *E.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Missouri v. Fiske*, 290 U.S. 18, 28 (1933). A search warrant is in its very essence a judicial procedure. *E.g., United States v. Jeffers*, 342 U.S. 48, 51 (1951). Because Congress has not authorized a waiver of tribal immunity or conferred jurisdiction on state courts to issue search warrants over the Tribe, its enterprise or its property, the state court lacked jurisdiction to issue the warrant and the County and its officials had no authority to execute it and seize the Tribe's property.

II. Other settled principles of federal law also preclude the County from executing a search warrant against the Tribe and its property. Execution of a state search warrant against the Tribe and tribal records infringes upon the Tribe's right to self-government—to regulate its members and to control internal affairs on its reservation—a right consistently sustained by two centuries of this Court's jurisprudence. *E.g., Williams v. Lee*, 358 U.S. 217, 223 (1959); *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832). Here, exercising its right to self-government, the Tribe has established confidentiality policies concerning access to and use of its governmental records. Allowing states or their subdivisions to override tribal policies such as these would directly and severely intrude on the rights of tribes to govern themselves free from state interference. The Tribe's confidentiality policies are intended both to protect employee privacy

interests and encourage full disclosure by tribal employees of all relevant information, an especially critical matter in a heavily regulated gaming enterprise. As illustrated by the variety and complexity of the many different privacy laws enacted by the United States and the states—which define the precise circumstances under which they will release confidential information even for law enforcement purposes—a government's ability to operate and effectively provide government services often depends on the government's control over the use and dissemination of confidential information. Indian tribes, including the Bishop Paiute Tribe, provide a wide range of services, frequently operating federal programs pursuant to contracts under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-458bbb-2. Execution of state court search warrants against tribes would unavoidably and irrevocably interfere with tribes' federally protected right of self-government, by subordinating tribal law governing the control of tribal records and other tribal property to state law and by impeding tribes' ability to carry out vital governmental functions, operate programs and provide services—not only in its regulation of gaming, but in many other areas (such as health, education, child protection, and counseling programs). Moreover, the County had a number of alternative mechanisms to obtain this information that would not interfere with the Tribe's self-government.

IGRA authorizes and comprehensively provides for regulating tribal gaming operations. The Act offers states the opportunity to assume a measure of jurisdiction over tribal gaming that the state would not otherwise have to the extent agreed to in a tribal-state compact. *See Seminole Tribe v. Florida*, 517 U.S. 44, 48-49 (1996). Although in its gaming Compact with the Tribe, California sought and obtained significant jurisdiction over the Tribe's gaming enterprise in a wide variety of subject areas, the Compact does not authorize execution of a state court search warrant on the Tribe or its

enterprise. Accordingly, execution of the warrant is preempted by IGRA.

III. A decision by this Court that state courts have no jurisdiction to execute search warrants against tribal governments and their property will not convert Indian reservations into havens for fugitives or criminal activities. Pursuant to the federal government's exclusive power over Indian commerce, s*ee Seminole Tribe*, 517 U.S. at 72, Congress has enacted laws punishing virtually all criminal offenses on reservations, which the federal government has authority to prosecute. Congress in Public Law 280 also has authorized states, including California, to assume jurisdiction over offenses "by or against Indians" on reservations. 18 U.S.C. § 1162. As a result, California has jurisdiction to enforce state criminal law regarding offenses: "by or against Indians" on reservations, by non-Indians on reservations with non-Indian victims, *e.g., United States v. McBratney*, 104 U.S. 621 (1881); and by tribes and Indians outside the reservation, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

IV. While this question was not raised in the courts below and thus should not be heard here, *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001), Indian tribes are entitled to sue counties and their officials for compensatory damages under 42 U.S.C. § 1983. Section 1983 creates a cause of action to remedy state infringements of federal rights for a broad range of entities, including labor unions, and resident aliens, *e.g., Graham v. Richardson*, 403 U.S. 365 (1971), and has even been invoked by states suing as parens patriae. Tribes were especially vulnerable to infringement of their federally protected rights by states when Section 1983 was enacted, *e.g., Kansas Indians,* 72 U.S. (5 How) 737 (1867), as they are today. *E.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). And tribes have been within the jurisdiction of the United States throughout the history of the Republic, by virtue of the Treaty and Indian

Commerce Clauses. Other broad remedial statutes have been construed to allow governments to sue as a "person" when their rights are violated, *e.g., Georgia v. Evans*, 316 U.S. 159, 161 (1942), and Section 1983 should be so construed on behalf of tribes.

The search and seizure violated the Fourth Amendment because it was beyond the County's jurisdiction and thus foreclosed as "unreasonable." Execution of the warrant also violated the Tribe's rights under the Indian Commerce Clause, *see Dennis v. Higgins*, 498 U.S. 439 (1991), its rights under federal common law to self-government and to immunity from state court processes, *see National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985), and its rights under IGRA.

The County officials lacked qualified immunity because in 2000, when the controversy arose, the Tribe's rights were "clearly established" in the Ninth Circuit. All reported cases denied states authority to serve compulsory processes on tribes, *e.g., United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), and the Ninth Circuit had just held state officers had no jurisdiction to execute a search warrant on individual Indians on a reservation. *State of Nevada v. Hicks*, 196 F.3d 1020, 1027-28 (9th Cir. 2000), *rev'd*, 533 U.S. 353 (2001).

ARGUMENT

Introduction

The dispositive question in this case is whether a state court has authority to issue a search warrant to be executed against another sovereign government and its property. The County argues that state court search warrants can be executed upon a tribal government and its property on the tribe's reservation trust lands even though Congress has not authorized either a waiver of the Tribe's sovereign immunity or any state court jurisdiction over the Tribe, its enterprise or its property. The County's argument is fundamentally inconsistent with this Court's longstanding precedents which hold that tribes as governments are immune from state judicial process—absent a waiver by Congress or the tribe—and that, except as specifically authorized by Congress, states have no authority to interfere with a tribe's exercise of its powers of internal self-government on its reservation.

The County and its supporting *amici* ask this Court to depart radically from these core principles, relying principally on this Court's recent decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). But *Hicks* involved search warrants directed at and criminal jurisdiction over *individuals*, not a tribal government. Nothing in *Hicks* or any other decision of this Court even remotely suggests that a state court has jurisdiction to execute a search warrant against another sovereign government, whether it be the United States, a foreign government, a sister state, or an Indian tribe.

Indeed, *Hicks* is completely distinguishable from this case. *Hicks* concerned "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355. The Court first considered whether tribes have legislative jurisdiction to "regulate state wardens executing a search warrant for evidence of an off-reservation crime," *id.* at 358, and determined that tribes do not, because "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them,'" *id.* at 364. Relying upon its prior holding in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id.* at 453, the Court then concluded that, since the tribe could not regulate their conduct, the tribal court lacked jurisdiction over a suit against the state officers.

The Court recognized in *Hicks*:

> [W]here the issue is whether the [state law enforcement] officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the . . . federal courts . . . to vindicate constitutional or other federal . . . law rights.

533 U.S. at 373. The present case is just such a suit in federal—not tribal—court. It challenges a state court search warrant executed *against a tribal government and its property*, not an individual Indian. And, unlike the situation in *Hicks*, this case does not deal with any assertion of tribal legislative or judicial authority over state or county officials. Instead, here the State seeks to assert such authority over a tribe. The Tribe seeks simply to vindicate its right to promulgate its own internal laws governing its relationships with its members and employees, control access to its own confidential records, and operate its gaming enterprise on its reservation in the manner authorized by a federal statute.

I. AS A MATTER OF FEDERAL LAW, SOVEREIGN IMMUNITY BARS THE SEARCH AND SEIZURE OF A TRIBE'S PROPERTY PURSUANT TO A STATE COURT SEARCH WARRANT

This Court has consistently held that federal law protects the immunity of tribes, like other sovereigns, from judicial authority absent their consent or authorization by Congress. *E.g.*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[6] The Court has determined that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, Inc.*, 476 U.S. 877, 890 (1986) (hereinafter *Three Affiliated Tribes II*), and held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

[6] Federal courts have recognized tribal sovereign immunity for over a century. *See Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).

On repeated occasions, this Court has specifically held that the immunity doctrine protects tribes against compulsory state court orders. *E.g.*, *Kiowa*, 523 U.S. at 755-56; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991); *Three Affiliated Tribes II*, 476 U.S. at 891; *Puyallup Tribe v. Dep't of Game of State of Washington*, 433 U.S. 165, 172-73 (1977). In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756.

In *Three Affiliated Tribes II*, the Court made clear that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." 476 U.S. at 891. The Court struck down a state statute conditioning the availability of state courts to tribes and Indians for civil claims on the waiver by the Tribe of sovereign immunity for all civil suits, holding the statute "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Id.* at 891.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court also applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court consequently invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members

authorized to exercise treaty fishing rights and the number of fish caught by such fishermen because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction. The Court *expressly distinguished* between the power of a state court to issue orders against individual tribal members and against the Tribe, holding that the state court had jurisdiction over the individual members but not the Tribe. *Id.* at 171-72.

In *Citizen Band Potawatomi*, the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine. *See, e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq*. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

498 U.S. at 510.

As noted by the County in its Brief, the Court in *Kiowa* expressed concerns about the wisdom of perpetuating the tribal immunity doctrine,[7] but nonetheless reaffirmed that

[7] Sustaining the Tribe's immunity here does not "extend[] beyond what is needed to safeguard tribal self-governance." *Kiowa*, 523 U.S. at 758. *See* Part II.A, *infra*. This is not a case involving "purely off-reservation conduct . . . that has no meaningful nexus to the tribe's land or its sovereign functions." *Id.* at 764 (Stevens, J., dissenting). *See also Citizen Band Potawatomi*, 498 U.S. at 515 (Stevens, J., concurring) (questioning whether "the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory").

tribal sovereign immunity is "settled law" and once again declined an invitation to revise it, citing Congress' past reliance on the doctrine and power to alter it. 523 U.S. at 758-59. Congress has continued to take an active role in assessing the tribal immunity doctrine. For example, at the time of the *Kiowa* decision, bills had been introduced in Congress to limit the scope of tribal sovereign immunity, and Congress has considered similar proposals since. *See* S. 615, 106th Cong. (1999); S. 1691, 105th Cong. (1998); S. 2097, 105th Cong. (1998). None of these bills has been enacted. While Congress has amended a prior statute to require that certain tribal contracts waive or otherwise address tribal immunity, *see* 25 U.S.C. § 81, *amended by* Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000),[8] it has otherwise reaffirmed that tribal immunity should continue to apply with full force, *see* Tribal Self-Governance Amendments, Pub. L. No. 106-260, § 516, 114 Stat. 711 (2000).[9]

[8] In the amendment, Congress—perhaps mindful of this Court's observation in *Kiowa*, that "[i]n the economic context, immunity can harm those who are unaware that they are dealing with a tribe, [or] who do not know of tribal immunity," 523 U.S. at 758,—provided that any tribal contract the Secretary approves must include provisions that either: (1) define remedies in the event of a breach; (2) reference tribal laws that disclose the tribe's right to assert sovereign immunity; or (3) include an express waiver of the tribe's sovereign immunity and any limitations on that waiver. 25 U.S.C. § 81(d)(2) (as amended). As the Committee Report states, one purpose of this amendment is "to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes." S. REP. NO. 106-150, at 1 (1999).

[9] In this Act, Congress reaffirmed its approval of the tribal sovereign immunity doctrine by requiring that provisions of the Indian Self-Determination and Education Assistance Act, including the Act's recognition of the immunity doctrine, 25 U.S.C. § 450n, apply to tribal

Although no decision from this Court squarely addresses the application of sovereign immunity to the attempted execution of a state court search warrant on a tribe or any other government or its property, established principles of sovereign immunity leave no doubt that the doctrine fully protects tribes from such a warrant.

First, sovereign immunity protects the operation of governments and their property from any legal process to which the sovereign has not given its consent. *E.g., Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). The Court has consistently rejected arguments that the availability of a sovereign's immunity may be made to turn on the form of judicial process, or the remedy sought. Thus, this Court has declined to find exceptions to the sovereign immunity doctrine based on arguments that the proceedings are in rem, *see Missouri v. Fiske*, 290 U.S. 18, 28 (1933) ("[t]he fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state"); *see also United States v. Shaw*, 309 U.S. 495, 502-03 (1940); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992), or where the judicial proceedings at issue would, as a practical matter, affect a sovereign's rights to or interests in its property, s*ee Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997); *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 n.21 (1987).[10] The question of

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health programs covered by the 2000 Amendments. *See* H. REP. NO. 104-477, at 32 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 589.

[10] In *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), a plurality of the Court upheld a federal court warrant for seizure of property salvaged from a shipwreck in possession of a State on the ground that the State had no colorable claim of title to the property. *Id.* at 699. The plurality opinion pointed out that the State's prior title claim had been litigated and rejected by this Court in another suit to which the State was a party. *Id.* at 694-96. A separate opinion, authored by Justice White speaking for four members of the Court, disagreed with the plurality's

immunity does not turn on how a legal proceeding is styled, but upon "the essential nature and effect of the proceeding," *Idaho v. Coeur d'Alene*, 521 U.S. at 277, (*quoting Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945)), and whether the proceeding is the "functional equivalent" of an action against the sovereign, *id.* at 281; *see id.* at 289 (O'Connor, J., concurring). *See also Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n. 11 (1984).

These basic principles were set forth in *Larson*. Rejecting arguments that sovereign immunity should not be available to suits in equity that seek "specific relief, *i.e.* the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant's officer's actions," *Larson,* 337 U.S. at 688, the Court relied on the vital importance of sovereign immunity to a government's ability to carry out its duties to the community it is obligated to serve. The Court in *Larson* concluded, as it recently did in *Kiowa*, 523 U.S. at 758-59, that because of the impact that a waiver of sovereign immunity has on a government's ability to carry out its functions, the question of whether to waive that immunity, and if so, the nature of the proceeding to which the waiver should extend, are matters for Congress and not the courts to decide. *Larson*, 337 U.S. at 703-04.

Second, the courts have held that these principles of immunity, and their purpose in protecting governments from the disruption and interference that would result from assertions of judicial authority to which the government has not consented, apply to bar all forms of state judicial process against governments. The federal courts have held that federal agencies or officials are immune from state court

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view that enforcement of process against the res could be divorced from the State's immunity from a suit to determine the State's right to the res. *Id.* at 703 (White, J., concurring in part and dissenting in part).

subpoenas in cases where the agency is not a party, unless the agency's own regulations provide procedures by which the information sought by the court can be obtained and effect a waiver of immunity. *See, e.g., In re Elko County Grand Jury*, 109 F.3d 554, 556-57 (9th Cir. 1997); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 315-17 (7th Cir. 1994); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989); *Swett v. Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986); *see also United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951) (holding that a subordinate federal official acted lawfully and should not have been held in contempt for refusing to honor a federal court subpoena where an agency regulation barred disclosure).

Likewise, this Court has long recognized that sovereign immunity bars other forms of state court process issued against federal agencies and officials absent an express waiver of sovereign immunity. *See Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 516-17 (1984) (holding that a state tax levy was enforceable against a federal agency only because Congress had enacted a "sue and be sued clause," thereby waiving the agency's immunity); *Federal Housing Administration Region No. 4 v. Burr*, 309 U.S. 242, 245-46 (1940) (finding that a writ of garnishment issued by a state court against funds in possession of a federal agency was enforceable only because Congress had expressly waived the agency's sovereign immunity; "[c]learly the words 'sue and be sued' in their normal connotation embrace all civil process"); *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846) (holding that a state court order for attachment of wages in possession of federal disbursing agent and due to be paid to federal employee unenforceable against the federal officer).

Similar immunity is accorded to foreign sovereigns. Under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, adopted by the United States and several other countries, the premises of

diplomatic and consular facilities "shall be inviolable," and States cannot serve search warrants or other process on consulates or missions of foreign nations or of international organizations within their borders. Vienna Convention on Diplomatic Relations, April 18, 1961, art. 22, cl. 1, 23 U.S.T. 3227; Vienna Convention on Consular Relations, April 24, 1963, art 31, cl. 1, 21 U.S.T. 77. The "archives and documents" of such facilities "shall be inviolable at any time and wherever they may be." Vienna Convention on Diplomatic Relations, art. 24; Vienna Convention on Consular Relations, art. 33; *see also*, Restatement (Third) Foreign Relations, § 466 cmt. c (1987) ("Diplomatic and consular premises are immune from search, requisition, attachment or execution"). Similarly, the property, assets and archives of international organizations having offices in the United States are "immune from search, unless such immunity be expressly waived, and from confiscation." 22 U.S.C. § 288a(c). In fact, while an embassy or consulate is deemed to be within the territorial jurisdiction of a state, such jurisdiction does not render the premises and property of that embassy or consulate subject to search or seizure by the state. *See* Restatement (Third) Foreign Relations, § 466 cmt. a (1987).

Third, while the County argues that "this Court's judicially established doctrine of tribal sovereign immunity from civil suit . . . should [not] be extended to include immunity from state criminal process," County Br. at 32, nothing in this Court's Indian law or sovereign immunity jurisprudence supports such a dichotomy between civil and criminal cases. *See, e.g., Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (holding that the definition of "Indian country" in federal criminal law (18 U.S.C. § 1151) circumscribes the reach of state tax jurisdiction). It is unthinkable that the State of Washington could have circumvented the Court's holding in *Puyallup* that the Tribe's immunity protected it from a state court order to provide a list of its members by bringing a criminal prosecution against indi-

vidual Indians engaged in fishing and then executing a search warrant against the Tribe for its membership list. Forcible execution of a search warrant, to which a tribe has no opportunity to object, is even more invasive of tribal sovereignty than a civil subpoena or discovery request which a tribe can oppose, or than civil litigation against it which a tribe can move to dismiss.[11]

Fourth, the County's argument flies in the face of the fact that a search warrant is by its very nature a judicial process. As the Court explained in *United States v. Jeffers*, 342 U.S. 48 (1951), discussing the warrant clause of the Fourth Amendment: "[t]he mandate of the Amendment requires adherence to judicial processes." *Id.* at 51 (citations omitted); *see also United States v. Leon*, 468 U.S. 897, 913-917 (1984);

[11] There is no question that, while a search warrant may be directed at a particular place or property, a warrant also runs against the owner of that property whose rights and interests are invaded. *See, e.g., Nevada v. Hicks*, 533 U.S. at 355 (search warrants were "executed against a tribal member"); *Bond v. United States*, 529 U.S. 334, 337-39 (2000); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128, 134-35, 142-43 (1978); *Katz v. United States*, 389 U.S. 347, 351 (1967). Where the owner of the property is a sovereign and has not consented to the judicial process, execution of the warrant—the search and seizure of the sovereign's property—irretrievably deprives the sovereign of its right of immunity from judicial process. Without injunctive relief (as the Tribe sought in this action), the sovereign's immunity from such judicial process, as well as its right of self-government, is simply lost and cannot be vindicated after the warrant is executed. *See, e.g., Puerto Rico Aqueduct Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-46 (1993) (finding that because a sovereign's immunity is an immunity from the judicial proceedings, and not "a mere[] defense to liability," the sovereign's interest in its immunity cannot be vindicated if litigation is allowed to proceed); *see also Ex parte New York*, 256 U.S. 490 (1921) (allowing State to bring writ of prohibition in this Court to compel dismissal of federal admiralty proceeding on grounds that the action was barred by the state's immunity under the Eleventh Amendment—even though the objection to federal jurisdiction might have been raised in appeal from that action).

Connally v. Georgia, 429 U.S. 245, 250 (1977). Since a search warrant is a judicial act, a court can issue a warrant only where it has jurisdiction. *See, e.g., United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001); *United States v. Baker*, 894 F.2d 1144, 1146 (10th Cir. 1990) (per curiam); *see generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 4.2(f) (3d ed. 1996); Susan W. Brenner, *Need For Reciprocal Enforcement of Warrants and Subpoenas in Cybercrime Cases*, PROSECUTOR, Jan/Feb. 2003, at 29 (recognizing that states lack jurisdiction to enforce search warrants in other states even against individuals).

Taken together, these principles lead to but one conclusion. The issuance of a search warrant constitutes the exercise of judicial authority over the Tribe and its property. As with other judicial process, a tribe's sovereign immunity bars this judicial authority. Only Congress or a tribe can waive tribal immunity. No Act of Congress waives tribal immunity or confers jurisdiction on state courts to issue search warrants over either the Tribe or its property. The County does not contend otherwise. In fact, it now[12] concedes that Public Law 280 does not authorize the warrant in this case. County Br. at 25 n. 11. Public Law 280 does not apply here because it only authorizes state jurisdiction over crimes committed "by or against Indians" on reservations. *See Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) ("there is notably absent any conferral of state jurisdiction *over the tribes themselves*" in Public Law 280) (emphasis added); *accord Three Affiliated Tribes II*, 476 U.S. at 892 ('[w]e have never read Pub[lic] L[aw] 280 to constitute a waiver of tribal sovereign immunity, nor found Public Law 280 to represent an abandonment of the federal interest in guarding Indian self-governance").

[12] The County argued below that Public Law 280 *did* authorize the search warrant in the Ninth Circuit, J.A. 154, and district court, J.A. 134.

Nor is the warrant against the tribal enterprise or tribal property authorized by the Compact negotiated pursuant to IGRA. IGRA requires that tribes like Bishop Paiute wishing to conduct "Class III gaming"—non-bingo type games such as slot machines, banking card games and the like—must conclude a compact with the State that must be approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3)(B). IGRA provides that a compact may cover a broad range of subjects concerning the conduct of Indian gaming, including the application of tribal and state criminal and civil laws regulating the gaming activity and the allocation of state and tribal criminal and civil jurisdiction necessary to enforce those regulatory laws. *Id.* § 2710(d)(3)(C). The Tribe's Compact with California provides for substantial regulatory jurisdiction over the Tribe's Class III games by the State and its agencies. *See* Part II.B, *infra*. However, the Compact does *not* require the Tribe to provide employee personnel records to county officials investigating violations of state welfare law or authorize execution of search warrants against the Tribe or its gaming operation.

Accordingly, because the Tribe has not waived its immunity and consented to the search warrant and because Congress has not authorized the state court to issue a warrant against the Tribe, its enterprise or its property, the state court was without jurisdiction to issue the warrant and the County and its officers had no authority to execute it.

II. OTHER PRINCIPLES OF FEDERAL LAW PRECLUDE EXECUTION OF A STATE COURT SEARCH WARRANT AGAINST THE TRIBE OR ITS PROPERTY

Separate, equally forceful principles of federal law protect the Tribe and its property from the execution of a state court search warrant. While the legal relationships between tribes, states, and the United States have been described by this Court as "anomalous" and "complex," *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (citation and quotation omitted), the law remains anchored in certain time-honored principles. First, "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) (construing U.S. CONST. art. I, § 8, cl. 3 and citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)); *accord Seminole Tribe v. Florida*, 517 U.S. 44, 62, 72 (1996). As a result, tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

For these reasons, the Court has determined that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786. 789 (1945)). Thus, "in the absence of federal authorization, . . . all aspects of tribal sovereignty [are] privileged from diminution by the States." *Three Affiliated Tribes II*, 476 U.S. at 891. Importantly, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character . . . [which] exists only at the sufferance of Congress and is subject to complete defeasance . . . [but] *until Congress acts, the tribes retain their existing sovereign powers*." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added).

The Court has also recognized that Congress has acted "consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Bryan v. Itasca County*, 426 U.S. at 376 n. 2 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Because of the breadth of Congress' exclusive power over Indian Commerce, this Court has held that a federal statute need not *expressly*

preempt state jurisdiction over tribes and their members on reservations. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-17 (1987), *Three Affiliated Tribes II*, 476 U.S. at 885; *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

The Court has summarized the rules for federal preemption in the Indian context as follows:

> [A]ssertion of state authority over tribal reservations remains subject to "two independent but related barriers." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). First, a particular exercise of state authority may be foreclosed because it would undermine "'the right of reservation Indians to make their own laws and be ruled by them.'" *Ibid.*, quoting *Williams v. Lee*, 358 U.S. at 220. Second, state authority may be preempted by incompatible federal law . . . (citations omitted).

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 147 (1984) (*Three Affiliated Tribes I*); *see also Rice v. Rehner*, 463 U.S. at 718-19; *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-45. The search warrant in this case transgressed both these barriers. First, the warrant interferes with the Tribe's right to govern its internal affairs—by disrupting the Tribe's ability to control access to its confidential records and operate a vital enterprise on its reservation pursuant to its confidentiality policies. Second, Congress has already legislated in the area, setting forth a comprehensive structure—negotiation of a tribal-state compact—pursuant to which states can regulate tribal gaming enterprises. The absence of any compact provision authorizing a state court warrant in these circumstances precludes its validity.

A. The search and seizure of tribal property pursuant to a state court warrant interferes with the Tribe's right of self-government

The principle that Indian tribes have the right to self-government and regulatory power over their internal relations is established by two centuries of this Court's precedents. As the Court held in the historic Cherokee cases, an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and retains the "right of self-government," free from state interference. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832). While the Court has modified the principles of the Cherokee cases, principally in matters involving authority over non-Indians, *e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), it has consistently recognized that with respect to its members on its reservation, a tribe has "the right . . . to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. at 220; and that state action may not infringe upon that right. *See also White Mountain Apache Tribe*, 448 U.S. at 141-43; *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *McClanahan*, 411 U.S. at 171-73.

A more direct threat to a tribe's self-governing powers and political integrity can hardly be imagined than the seizure of tribal property by County officers over the Tribe's objections and in violation of tribal policies protecting the confidentiality of tribal records. The Tribe's policies prohibit third party access to tribal employee personnel records without the written consent of the employee to whom the records relate, except as provided by its gaming Compact or federal law. The court of appeals found that the Tribe's policies and procedures regarding its records are "in many instances based on federal and state guidelines." J.A. 155, 159. Like the

United States, *see* 5 U.S.C. §§ 552, 552a, and many states,[13] including California, CAL. GOV'T. CODE §§ 6250, 6254(c), the Tribe has exercised its governmental authority to adopt privacy policies to govern its employees and operations. The purpose of those policies is both to protect employees' privacy interests and encourage full and accurate disclosure of all relevant information by tribal employees in matters related to their employment.

Protecting information disclosed by its employees against release without their consent is especially critical for a highly regulated tribal gaming enterprise. The Tribe is required by IGRA and regulations issued under it by the National Indian Gaming Commission [14] to conduct background investigations

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[13] In *Detroit Edison Company v. National Labor Relations Board*, 440 U.S. 301, 318 n. 16 (1979), the Court found:

> A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies. *See e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed unless the request falls within explicit statutory exception) . . . *See also* U.S. Privacy Protection Study Comm'n, Personal Privacy in an Information Society (1977) (recommending that all employers should be under a duty to safeguard the confidentiality of employee records).

(citations omitted).

[14] This Commission was established by IGRA to regulate Indian gaming. The Commission or its Chairman are empowered to approve tribal gaming ordinances, 25 U.S.C. § 2710(d)(1)(A)(iii), temporarily and permanently close tribal games, *id.*, § 2713(b), inspect all papers, books and records and subpoena documents relating to tribal gaming, *id.*, §§ 2706(b)(4), 2715, and promulgate regulations governing tribal gaming. *Id.* § 2706(b)(10). *See generally* 25 C.F.R. Part 500. Under its authority to issue regulations, the Commission has promulgated detailed minimum internal control standards for all tribal gaming to safeguard the honesty and financial integrity of tribal games. 25 C.F.R. § 542.

of and then license virtually all its gaming employees.[15] 25 U.S.C. §§ 2710 (b)(2)(F), 2710(d)(2)(A); 25 C.F.R. §§ 556.4, 556.5, 558.3. Under these provisions, after conducting complete background investigations, the Tribe must submit the investigations and proposed licenses to the Commission,[16] which may object to or suspend any tribal license. 25 C.F.R. §§ 558.4, 558.5; *see also* 25 U.S.C. § 2710(b)(2)(F). The Commission must treat this information as confidential, except for providing any information that indicates a violation of federal, state or tribal law to appropriate enforcement authorities. 25 U.S.C. § 2716. *See* United States Br. at 27.

Enforcement of state court process against Indian tribes or tribal property in their operation of governmental programs and activities would unavoidably and irrevocably interfere with tribes' right of self-government. In this case, enforcing the search warrant would subordinate tribal policies to protect the confidentiality of tribal records to potentially inconsistent state law and state judicial processes.[17] The County's single-minded focus on its perceived law enforcement needs ignores the host of legitimate policy reasons that a tribal government might have for withholding sensitive information from State and County authorities. The United States and the

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[15] The employees who must be investigated and licensed are broadly defined in the Commission's regulations. 25 C.F.R. § 502.14. The Tribe has adopted stricter requirements and mandates the licensing of all employees.

[16] The Tribe must retain those records and investigative reports for at least five years, and at least three years after termination of employment for any key employee. 25 C.F.R. §§ 558.1(b), 571.7.

[17] In *Touhy*, the Court recognized the important interest that governments have in their records, stating "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951).

states, including California, have adopted numerous statutes addressing access to confidential public records[18] in which the federal and state governments have made deliberate and specific decisions on the precise circumstances under which confidential information may be released—even when access to the records is sought for law enforcement purposes. These statutes carefully balance the need to preserve the privacy of the records as necessary to carry out the government's objectives with the need to make the records available for other purposes.

[18] Federal statutes protect the confidentiality of records in the government's control, limiting even law enforcement access to such records. *E.g.* 26 U.S.C. § 6103 (protecting confidentiality of federal tax returns and strictly limiting their dissemination to other federal and state agencies, allowing their release to state agencies for only specifically enumerated purposes and uses); 42 U.S.C. § 290dd-2(c) (strictly limiting search and seizure of records relating to substance abuse treatment, and barring seizure of such records for purposes of criminal investigation of the patient).

California has also adopted a variety of laws defining specific terms and conditions when confidential information may be released, even for law enforcement purposes. *See e.g.*, CAL. REV. & TAX. CODE §§ 19542 - 19566 (protecting the confidentiality of tax returns subject to specifically enumerated exceptions); CAL. HEALTH & SAFETY CODE §§ 120292, 121025(d), 121050 (generally prohibiting release of public health records regarding AIDS in any criminal, civil or administrative proceeding except where necessary to protect health and safety); CAL. PENAL CODE §§ 1524 (c), (d) (restricting search warrants for documentary evidence in the possession of any attorney, physician, psychotherapist or clergyman who is not the subject of a criminal investigation, by requiring appointment of a special master to accompany execution of the warrant, and the placement of any records designated as privileged under seal subject to further special judicial proceedings); CAL. HEALTH & SAFETY CODE §§ 11977(c)(5), (d) (extending the special requirements of Penal Code § 1524(c) to search warrants for records of narcotic and substance abuse patients, whose records cannot otherwise be used by law enforcement to initiate or substantiate criminal charges against the patient).

Indian tribes must do precisely the same in operating their governments. Tribes provide a myriad of services on their reservations. In so doing they often operate federal programs on reservations pursuant to intergovernmental agreements with the United States authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458bbb-2. Tribes, for example, contract with federal agencies to operate hospitals, health clinics, schools, police and law enforcement programs, and public assistance programs. United States Br. at 26. The Bishop Paiute Tribe (either directly or through intertribal organizations) operates health care facilities (providing clinical outpatient services, dental care, substance abuse counseling, dialysis treatment, and optometry), educational (including head start and job training), and child protection, elder care, welfare,[19] and low and moderate income housing programs. Like the states and the federal government, tribes necessarily collect and main-

[19] As noted by the Government, United States Br. at 18 & n. 9, one of the government programs currently provided by the Bishop Paiute Tribe is the federally-funded TANF program, Temporary Aid to Needy Families, 42 U.S.C. §§ 601-681, under which the Tribe provides basic welfare services. Tribes operating TANF programs have an independent interest in and obligation to prevent welfare fraud. 45 C.F.R. § 286.75(f). And consistent with Congressional recognition of tribal rights of self-government independent of state jurisdiction, the statute authorizing the TANF program encourages states to enter into cooperative agreements with tribes on issues of common concern in implementing their respective TANF programs, s*ee* 42 U.S.C. §§ 654(7), (33), which offers another mechanism by which tribes and counties or states could exchange information related to welfare fraud. In addition, by this statute, Congress recognized that tribes may exercise jurisdiction to issue child support orders, and required that states and tribes give full faith and credit to child support orders issued by the other. *See* 28 U.S.C. § 1738B(b), 42 U.S.C. § 666(a)(9). *See also* S. REP. NO. 103-361, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3259, 3263.

tain highly confidential information about their employees as well as the individuals receiving these tribal services.[20]

In this case, moreover, the County had ample alternatives by which it might have obtained these records and which would not have interfered with the Tribe's right to govern itself.[21] *See Oklahoma Tax Comm'n v. Citizen Band Pota-*

[20] These include: patients' medical records, Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. §§ 2401-2471; records of all persons employed in positions of contact with children, Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201-3210, and reports of alleged child abuse and prevention of family violence, *id.* §§ 3203, 3205, 3210; student performance records, Tribally Controlled School Grants Act, 25 U.S.C. §§ 2501-2511; and adoption and foster care placement records, Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963.

[21] The Court has determined that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). These exceptional cases have most often permitted state jurisdiction to ensure the collection of sales taxes owed a state by non-Indians purchasing cigarettes and other commodities on reservations from tribal or Indian businesses. In these cases, the Court has concluded that the State's governmental interest is substantial and the burden on the countervailing tribal and federal interests "minimal." *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980); *see also New York Tax Dep't. v. Milhelm Attea & Bros.*, 512 U.S. 61, 71-72 (1994).

No exceptional circumstances that would justify state jurisdiction are presented here for several reasons. First, both the tribal and federal interests protecting the Tribe's operation of its gaming enterprise and enforcement of its privacy policies as to its tribal member employees are very substantial, as discussed *supra*. *See also Cabazon*, 480 U.S. at 216-19. Second, the State has a number of less intrusive alternatives to obtain the information. Third, Congress in IGRA enacted comprehensive legislation addressing how jurisdictional issues may be resolved with respect to tribal gaming operations. See Part II.B *infra*. And fourth, the chief interest the County asserts to support its claimed

watomi Indian Tribe, 498 U.S. 505, 514 (1991) ("sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). As the court of appeals determined, J.A. 161, the County could have obtained a search warrant for the property of the individual tribal employees under investigation. Or the County could have provided the Tribe with the consent of the employees for the release of the records found in the welfare application that the Tribe indicated that it was willing to accept. California's own laws require a welfare recipient to waive the privacy of employment records. *See* J.A. 161. If the County had provided it to the Tribe, this entire confrontation would have been avoided.

Other options are also available which would have shown proper respect for the Tribe's government. The State might seek to amend its Compact with the Tribe to add provisions governing the sharing of this kind of information in the possession of the gaming enterprise.[22] Alternatively, the State and County might avail themselves of the Compact provision that requires the Tribe and State to confer and agree on protocols to release information to other law enforcement agencies. J.A. 42 (Compact 7.4.3(b)(ii)). Finally, the County could seek to negotiate a cooperative intergovernmental agreement with the Tribe concerning the exchange of records

authority is that otherwise reservations would become lawless enclaves. As we show in Part III, *infra*, that is not so of the comprehensive framework Congress has enacted for law enforcement on reservations.

[22] The Compact has a term of twenty years, but may be amended at any time by agreement of the parties. J.A. 65-66 (Compact 11.2.1, 12.1). Certain provisions are specifically subject to renegotiation prior to the expiration of the term. J.A. 64, 19, 66 (Compact 10.8.3(b), 4.3.3, 12.2).

and sharing of resources needed for effective law enforcement concerning welfare fraud, as is common between states and tribes.[23]

Contrary to the County's argument, County Br. at 27-29, *Nevada v. Hicks* is fully consistent with protecting the Tribe from the state court warrant in this case. In *Hicks*, "*[s]elf*-government and *internal* relations . . . [were] not directly at issue, since the issue . . . [was] whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders." 533 U.S. at 371 (emphasis in original). *Hicks* reinforces that tribes retain inherent authority "necessary to protect tribal self-government or to control internal relations." *Id.*, at 359.[24] Even in cases where the Court has denied tribal

[23] "Some States have formally sanctioned the creation of state-tribal agreements [and] there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Hicks*, 533 U.S. at 393 (O'Connor, J., concurring) (citations omitted); *see also People v. Superior Court (Jans)*, 224 Cal. App. 3d 1405, 1408 (1990) (holding that an Indian tribe comes within Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, Cal. Penal Code §§ 1334-1334.6). *See generally* Brief of *Amicus Curiae* National Congress of American Indians *et al.* (hereinafter "NCAI Br."); Brief of *Amicus Curiae* State of New Mexico *et al.*

[24] The *Hicks* Court relied upon three nineteenth-century precedents to find a limited exception in that case to the general rule that states have no jurisdiction over reservation Indians: *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); and *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885). None of these cases sustained service of state process on the United States or a tribe and, like *Hicks*, none undermines the longstanding rule guarding the right of a tribe, as a government, to be free from state intrusion. *See Utah & Northern*, 116 U.S. at 31 (limiting the Idaho territory's process, which "may run into an Indian reservation . . . where the subject matter or controversy is otherwise within their cognizance" to "matters not interfering with" federal protection of the tribe and holding that "[t]o uphold [territorial] jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the Treaty stipulations, and

jurisdiction to regulate the on-reservation activities of non-Indians, the Court has recognized an exception—and thus the existence of tribal jurisdiction—where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). As the Court observed in *Strate*, this exception allows such tribal authority as "is necessary to protect tribal self-government or to control internal relations" and permits tribes to "make their own laws and be ruled by them." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). In the operation of its gaming enterprise on its reservation in the manner provided by IGRA and enforcement of its policies protecting the confidentiality of its records dealing with its tribal members employed there, the Tribe is exercising this federally protected right to govern its internal affairs.

B. State authority to issue and execute this warrant is incompatible with federal law

As this Court explained in *Seminole Tribe*, 517 U.S. 44, 73-74 (1996), IGRA provides a "carefully crafted and intricate remedial scheme" allowing states a power withheld from them under the Constitution to assume jurisdiction over tribal gaming through the compacting process. *See also id.* at 58. IGRA also specifically waives tribal sovereign immunity and allows states to sue tribes for violations of compacts. 25 U.S.C. § 2710(d)(7)(a)(ii). California did not avail itself of this procedure to authorize execution of state court search warrants on the Tribe and its enterprise. The lack of state

might thus defeat provisions designed for the security of the Indians"); *Fort Leavenworth*, 114 U.S. at 533 (upholding service of process on a corporation operating on a federal military reservation related to matters arising outside the reservation but within the State where the process did not "interfer[e] . . .in any respect with the Supremacy of the United States" over the fort).

authority pursuant to the procedures provided in this comprehensive statute establishes that state jurisdiction to execute the search warrant on the Tribe is preempted by federal law. *See also Three Affiliated Tribes II*, 476 U.S. at 885 ("where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law").[25]

The Bishop Paiute Compact provides considerable jurisdiction to California and its agencies over the Tribe's gaming enterprise in other subject areas. For example, it permits the State to participate in a dual licensing process for gaming employees *in addition to* the tribal-federal licensing proce-

[25] The Senate Committee Report on the bill that became IGRA evinced an intent to strictly limit state authority over tribal gaming facilities to the powers agreed to in the Compact:

> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S.555 [which was enacted as IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.

S. REP. NO. 100-446 (1988), at 5-6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76. The courts of appeals have uniformly concluded that states have no authority over Indian gaming enterprises except as provided in a compact. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545-47 (8th Cir. 1996); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990).

dure described *supra*. J.A. 37-38 (Compact 6.5.6). The Tribe must file all relevant personnel information and background investigations of employees with the State Gaming Agency (as well as the National Indian Gaming Commission), which must itself also license key tribal employees on a biennial basis. J.A. 27-28, 32-34, 37-40 (Compact 6.4.4., 6.4.8, 6.5.6). The State Gaming Agency may also inspect the enterprise and copy any books, papers and records at any time to monitor compliance with the Compact. J.A. 41 (Compact 7.4). The Compact provides, however, that the State Gaming Agency must keep this information confidential and may only release it with the consent of the employee. J.A. 32-34 (Compact 6.4.8) (requiring releases from employees permitting furnishing of background information to State Gaming Agency); J.A. 43 (Compact 7.4.3(b)) (requiring the State Gaming Agency to "exercise utmost care in the preservation of the confidentiality of any and all information and documents received from the Tribe and . . . apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure"); J.A. 43 (Compact 7.4.3(c)) (records received from Tribe in compliance with the Compact are exempt from disclosure under California Public Records Act).

The Compact covers a broad range of other subject areas as well and grants the State substantial authority in those areas. It requires the Tribe to adopt standards for building and safety codes, food and beverage handling and water quality and drinking water standards that are as stringent as state standards, and to allow state and county inspectors access to the tribal enterprise to ensure compliance with these provisions. J.A. 24-26, 56-57 (Compact 6.4.2, 10.2(a)-(c)). State inspectors are also given access to the Tribe's facility to ensure compliance with federal workplace and occupational safety and health standards. J.A. 57 (Compact 10.2(e)). The Tribe is required to participate in the State's workmen's compensation program or adopt a comparable one of its own, J.A. 59-60

(Compact 10.3(a)), and to adopt a specific labor-management statute as a condition to the Compact's validity, J.A. 61, 78 (Compact 10.7, as amended). The Compact also prescribes standards and procedures concerning tort liability, employment discrimination, check cashing, unemployment compensation, withholding state income taxes for certain employees, and off-reservation environmental impacts that either apply or generally mirror state law. J.A. 57-65 (Compact 10.2(d), 10.2(g), 10.2(h), 10.3(b), 10.3, 10.8).

As noted, however—although California could have negotiated with the Tribe for such an arrangement—the Compact does *not* subject the Tribe or its enterprise to search warrants or other legal process from state courts. California's failure to provide itself this authority by the mechanism provided in IGRA for states to assume jurisdiction over the enterprise—a negotiated compact between the State and Tribe—demonstrates that this warrant is preempted by federal law.

III. CONGRESS HAS ENACTED A COMPREHENSIVE FRAMEWORK FOR LAW ENFORCEMENT ON INDIAN RESERVATIONS WHICH BELIES THE COUNTY'S ASSERTION THAT UNLESS STATES HAVE AUTHORITY TO ISSUE AND EXECUTE SEARCH WARRANTS UPON A TRIBE AND ITS PROPERTY, RESERVATIONS COULD BECOME LAWLESS ENCLAVES

While it is true that states have extensive law enforcement powers and responsibilities in our federal system, County Br. at 31-34, under the Indian Commerce Clause of the Constitution "the regulation of Indian Commerce . . . is under the exclusive control of the Federal Government." *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996); *see also County* of *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law"); *Montana v.*

Blackfeet Tribe, 471 U.S. 759, 764 (1985). In the exercise of its plenary and exclusive Indian Commerce power, Congress has provided for federal prosecution of most crimes occurring on reservations. 18 U.S.C. §§ 1152, 1153. *See, e.g., United States v. Antelope*, 430 U.S. 641 (1977). Tribes, of course, have concurrent jurisdiction to prosecute crimes by Indians on reservations. *See United States v. Wheeler*, 453 U.S. 313, 323-24 (1978). Congress has also permitted states to assume considerable jurisdiction over Indians on reservations. This federal, state and tribal authority eliminates any possibility that reservations can become havens for fugitives or lawless activities. *See* United States Br. at 16-19; *see generally* NCAI Br.

For example, in Public Law 280, 18 U.S.C. § 1162, Congress has authorized California and a number of other states to exercise criminal jurisdiction "over offenses committed by or against Indians" on reservations. In states not covered by Public Law 280, the United States has jurisdiction to prosecute these criminal offenses. The United States also has jurisdiction to prosecute illegal gambling on reservations by tribes or anyone else (unless a compact places this jurisdiction in the State), 18 U.S.C. § 1166, *see* United States Br. at 17, and to prosecute thefts from Indian gaming establishments by their officers, employees or any other person. 18 U.S.C. §§ 1167, 1168.

This Court has also long recognized that states may try and punish offenses committed by non-Indians against non-Indian victims on reservations because no federal or tribal interests are implicated by such crimes. *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881). Most recently, the Court in *Hicks* recognized a criminal investigative power in states and their law enforcement officials over tribal members and other individuals on reservations. This Court also held Indians or tribes outside reservations are generally subject to state law. *E.g., Mescalero*

Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Finally, as detailed in the NCAI *amicus* brief, States also have substantial investigative powers arising from the numerous cooperative agreements that have been negotiated to ensure effective law enforcement in Indian country. *See generally* NCAI Br.

These broad federal and state powers conclusively refute the claims by the County and its supporting *amici* that unless state law enforcement officers are allowed also to execute search warrants against tribal governments and their property, reservations would somehow become lawless enclaves for fugitives and criminals. County Br. at 23-24. If an individual Indian commits a crime on a reservation in California, the State can prosecute that crime pursuant to Public Law 280, because Congress has authorized that jurisdiction. If a non-Indian commits a crime on a California reservation, California also can prosecute that crime either under Public Law 280 or under the Court's holdings in *Draper* and *McBratney*, depending upon whether the victim is Indian or non-Indian. If Indian or non-Indian individuals—such as "the Washington area sniper suspects," County Br. at 23—should commit an off-reservation offense and then seek refuge in a casino or elsewhere on a reservation, California can arrest them pursuant to Public Law 280.[26] In a non-Public Law 280 state, the United States could arrest the fugitive. Finally, *Hicks* recognizes some state power to execute search warrants on individuals or their property on reservations when investigating crimes over which the state has jurisdiction. These

[26] This case involves the protection of a tribe, its governmental operations and property used in connection with those operations from seizure or interference by the State. It does not concern individuals who occupy tribal lands or facilities. Tribal immunity does not extend to such individuals. Whether federal law might preclude state authority over some individual Indians on tribal land would depend on the particular factual circumstances and the relevant federal laws involved.

extensive federal and state law enforcement powers preclude any danger that reservations could become havens for criminals or criminal activities. If any changes in this framework should become necessary, these should be made by Congress.

IV. THE TRIBE IS ENTITLED TO COMPENSATORY DAMAGES IN THIS CASE UNDER 42 U.S.C. § 1983.

The Tribe's Complaint contains a cause of action seeking compensatory damages against the County and its officers under 42 U.S.C. § 1983.[27] As we show below, compensatory damages in this case are appropriate under Section 1983.

The County raises two issues in resisting the Tribe's claim to damages that were not briefed or considered at all in the courts below. This Court should accordingly not address them here. The County raised the question of whether an Indian tribe is a "person" under Section 1983 for the first time in its petition. This is a serious issue and the County offers no reason why it failed to present this contention below. *See*

[27] The Tribe also pled separate causes of action for declaratory and injunctive relief because: (1) the warrant exceeded the County's jurisdiction under federal law, including Public Law 280, and impermissibly interfered with the Tribe's right to self-government under federal law (Count 1); (2) IGRA preempted any authority the State might have to execute a search warrant on the Tribe's gaming enterprise (Count 2); and (3) federal law barred any future warrants and required return of the Tribe's records (Count 4). J.A. 105-110. Neither the County nor its supporting *amici* challenge the jurisdiction of the courts below to grant the Tribe declaratory and injunctive relief under 28 U.S.C. § 1331. Such jurisdiction clearly exists to declare unlawful or enjoin actions by State or County officials contrary to federal law or not authorized by Congress. *E.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *see generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S.114 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

United States v. United Foods, Inc., 533 U.S. 405, 416-17 (2001); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981)(stating that although an argument was presented in the certiorari petition, "that question was not raised in the Court of Appeals and is not properly before us"). In addition, the County has significantly reformulated its theory concerning violation of the Fourth Amendment, claiming for the first time in its merits brief that the Tribe as a sovereign is not protected under the Amendment. This contention also should not be considered for the first time here. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

A. The Tribe is a "person within the jurisdiction" of the United States"

Section 1983 was enacted for the broad purpose of remedying deprivation of federal rights by persons acting under the authority of state law. Tribes have been especially vulnerable to infringement of their federally protected rights by states. This was true at the time Section 1983 was enacted in 1871, *see Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and it is true today, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

To fulfill its purposes, Section 1983 has been held to authorize suits by a broad range of potential plaintiffs, including corporations, *Grossjean v. American Press Co.*, 297 U.S. 233, 244 (1936), labor unions, *Allee v. Medrano*, 416 U.S. 802, 814 (1974), and aliens residing in the United States, *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

The Tribe is of course a sovereign government, not an individual, but—contrary to the County's argument, County Br. at 36-38—its governmental status should not bar it from suing as a "person" under Section 1983. Lower courts have held that a State may bring suit under Section 1983 in its *parens patriae* capacity, *see Pennsylvania v. Porter*, 659 F.2d 306, 316 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), which the Tribe has done here, J.A. 96. Various courts of appeals that have addressed the question have treated tribes as persons for purposes of Section 1983, *Native Village of Venetie v. Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *see also, Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), as have most federal district courts, *e.g., Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F.Supp. 1118, 1127 (D. Minn. 1994), *aff'd on other grounds*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Lac Courte Oreilles Band v. Wisconsin*, 663 F. Supp. 682, 691 (W.D. Wis. 1987), *appeal dismissed*, 829 F.2d 601 (7th Cir. 1987).

The legislative history of the 1871 Civil Rights Act gives no indication that Congress intended to exclude Indian tribes from the category of "persons" capable of bringing an action under the Act. The 1870 Senate Judiciary Committee Report, S. REP. NO. 41-268 (1870), relied on by the United States, in fact provides no evidence of such an understanding. The Report concluded that *individual* Indians were not "persons . . . subject to the jurisdiction" of the United States within the meaning of the *citizenship clause* of Section 1 of the Fourteenth Amendment, and therefore were not citizens. *Id.* at 1. Similarly, in *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court held that individual Indians were not "persons . . . subject to the jurisdiction," *id.* at 102, of the United States as that phrase is used in the Fourteenth Amendment, and therefore did not become citizens of the United States under that Amendment. This was because they "owed immediate allegiance to their

several Tribes and were not part of the people of the United States." *Id.* at 99.[28] But in contrast to individual Indians, at the time Section 1983 was enacted, tribes were surely within the jurisdiction of the United States pursuant to the constitutional powers "to regulate Commerce . . . with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and conclude treaties, *id.* art. II, § 2. *See also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes are not foreign states but domestic dependent nations "completely under the sovereignty and dominion of the United States").[29]

This Court's holding that a state is not a "person" *subject to suit* under Section 1983, *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), does not preclude an Indian tribe from *bringing suit* under Section 1983. On the contrary, *Will*

[28] Tribal members, having been made citizens by Congress, can sue as plaintiffs today under Section 1983. *See* United States Br. at 10.

[29] The United States places inordinate emphasis on a statement at the end of a report by the Senate Judiciary Committee in 1870 that Indian tribes "are not, within the meaning of the fourteenth amendment, 'subject to the jurisdiction of the United States.'" *See* United States Br. at 9 (quoting S. REP. NO. 41-268 (1870)). The specific question that the 1870 Report addressed and analyzed was whether individual Indians were "subject to the jurisdiction of the United States" within the meaning of the citizenship clause of the Fourteenth Amendment. The Judiciary Committee did not address—and could not have addressed—the question whether Indian *tribes* were "subject to the jurisdiction of the United States" within the meaning of that clause, because tribes were neither "born" nor "naturalized" and thus could not possibly have been citizens.

In any case, it is clear that tribes today are "subject to the jurisdiction of the United States" by virtue of the plenary power of Congress. This Court so held in *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) and *Lone Wolf v. Hitchcock*, 187 U.S. 533, 565 (1903), and has continued since then to sustain plenary—though not absolute or unreviewable—federal jurisdiction over tribes and tribal Indians. *E.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-86 (1977). There is, accordingly, no reason to read Section 1983 as excluding tribes today as potential plaintiffs.

shows that whether a sovereign entity like a state comes within the meaning of "person" as used in a given statute requires a close contextual analysis of congressional purpose, the legislative context, sovereign immunity doctrine, and whether a particular construction would subject the entity to liability and potentially alter the constitutional balance. *Id.* at 64-67, 71 n.10. Applying this contextual approach, the *Will* Court held that subjecting states to liability under Section 1983 would disturb the states' Eleventh Amendment immunity and alter the federal-state balance, and that the legislative history did not indicate such a purpose on the part of Congress. *Id.* at 65-67.

This Court has held that Congress intended Section 1983 to provide a powerful civil remedy "against all forms of official violation of federally protected rights." *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 700-01 (1978), and should be "broadly construed" to achieve its remedial purposes. *Id.* at 684-85. In addressing similar statutes, this Court has construed those "persons" for whom the statutory remedy was made available as including sovereign entities. In *Georgia v. Evans*, 316 U.S. 159 (1942), for instance, this Court held that a State constituted a "person" capable of bringing a treble-damages suit under Section 7 of the Sherman Act. *Id.* at 161-62. The Court concluded that "[n]othing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State," from "all redress . . . when mulcted by a violator of the Sherman Law, merely because it is a State." *Id.* at 162-63. Similarly, in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), this Court held that a foreign government was a "person" authorized to bring a treble-damages suit under Section 4 of the Clayton Act, "[i]n light of the [antitrust] law's expansive remedial purpose." *Id.* at 313. Section 1983 should likewise be read to allow Indian tribes to sue as "persons" because that best comports with the remedial purposes of Section 1983 to protect federal rights

against infringement by those purporting to act under color of state law.

B. The County and its officers deprived the Tribe of "rights, privileges or immunities secured by the Constitution and laws" of the United States

The Ninth Circuit correctly held that executing the search warrant violated the Tribe's rights because it was beyond the County's jurisdiction. J.A. 147. Since the County did lack jurisdiction for the reasons discussed *supra*, and because the County had a number of available alternatives for securing this information in a manner that would not interfere with the Tribe's right to self-government, search and seizure of the Tribe's property was "unreasonable" under the Fourth Amendment.[30]

The Ninth Circuit rejected the Tribe's argument that the Tribe's right to self-government also provided it a right to sue under Section 1983 because that court's own precedent had rejected that argument. J.A. 178 n. 7 (citing *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-663 (9th Cir. 1989). In fact, however, infringement of the Tribe's right to self-government and its sovereign immunity from state court processes are rights under the Constitution and laws of the United States enforceable under Section 1983.

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[30] For the first time in this case the County questions whether the Tribe is "within the concept and meaning of 'the people' as that term is used in the Fourth Amendment," County Br. at 40, as does the Government, United States Br. at 28-29, relying on this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Because this issue was not raised below, it should not be considered in this Court for the first time. *E.g.*, *United Foods*, 533 U.S. at 416-17. In any event, *Verdugo-Urquidez* is inapposite since it concerned whether a citizen and resident of Mexico was protected by the Fourth Amendment from seizure of his property in Mexico by federal drug enforcement officers working in concert with Mexican authorities.

First, these rights are within the protection of the Indian Commerce Clause, because "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause . . . [since] the States . . . have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996). This Court has held that Section 1983 creates a cause of action for violations of the Commerce Clause. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991). In *Dennis*, this Court specifically rejected the view that the Commerce Clause only allocates power between the United States and states. Rather, the Court held it creates rights by limiting state power to unduly burden or restrict commerce protected by the Clause. *Id.* at 446-49.

Second, these rights are protected by federal common law and statutes, and thus the "laws" of the United States. The statutory grant of jurisdiction of "all civil actions arising under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331, includes "claims founded upon federal common law as well as those of a statutory origin." *Illinois v. City of Milwaukee*, 406 U.S 91, 100 (1972). In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), this Court, citing *City of Milwaukee*, held federal common law governs the extent of a tribe's power to regulate non-Indian activities, and thus such cases are properly brought under Section 1331. *Id.* at 850-53; *accord County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-236 (1985). In the present case, the Tribe claims that federal law—the Tribe's immunity from suit and its right to self-government—curtails the power of the County to execute a search warrant on it. The Tribe's right to be free from that exercise of power is accordingly protected by "laws" of the United States and is properly asserted under 42 U.S.C. § 1983. As the Court observed in *Dennis:*

> A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.) Accordingly, we have "repeatedly held that the coverage of [§ 1983] must be broadly construed." The legislative history of the section also stresses that as a remedial statute, it should be "liberally and beneficently construed."

498 U.S. at 443 (citations and footnotes omitted). *See also Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700-701 (1978) (Section 1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights").

Moreover, the Tribe has the right under IGRA to be free of state control of its gaming operation except for such control that it has agreed to in its Compact with the State. Just as the collective bargaining process under the National Labor Relations Act is protected from state infringement, *see Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the bilateral Compact under IGRA is the exclusive mechanism by which tribal gaming can be made subject to state authority, and the Tribe thus has a right pursuant to federal law to be free from any additional interference in its gaming operations by the County, which right can be asserted under Section 1983.

C. The Sheriff and District Attorney lack qualified immunity

The County and its supporting *amici* as well as the United States argue that even if the facts alleged by the Tribe show that execution of the search warrant violated the Tribe's federally protected rights—thus satisfying the initial threshold inquiry in determining whether qualified immunity applies, *see Saucier v. Katz*, 533 U.S. 194 (2001)—the second part of the test this Court established in *Saucier* is not met because the Tribe's rights were not "clearly established," *id.* at 201, at

the time the warrant was executed. *See also Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002).

To prevail under this standard, the Tribe does not need to identify case law with "'materially similar' facts," *Hope,* 536 U.S. at __, 122 S.Ct. at 2515-16, and the "very action in question," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), need not have been determined to be unlawful. Although no court had specifically prohibited executing a state court search warrant against a tribal government, sometimes the "easiest cases don't even arise." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citations omitted).

The state of the law in the Ninth Circuit as of March 2000 gave the sheriff and district attorney "fair warning" that the warrant was unlawful, such that no reasonable district attorney would have sought the warrant against the Tribe or its property and no sheriff should have executed it. In the few reported cases where states had sought to serve compulsory process on tribes, courts had denied this authority to states. J.A. 178-79; *see also Sycuan Band of Mission Indians v. Roache*, 788 F.Supp 1498, 1508 (S.D. Cal. 1992), *aff'd* 54 F.3d 535 (9th Cir. 1995); *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990) (per curiam).[31] Moreover, in January 2000, two months before these search warrants were executed, the Ninth Circuit held that a state court had no jurisdiction to issue a search warrant on an individual Indian on a reservation when that individual was charged with an

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[31] *United States v. James*, 980 F.2d 1314 (9th Cir. 1992) invalidated a federal court subpoena *duces tecum* issued on behalf of a defendant in a federal criminal prosecution to a tribal government official for confidential medical information in a tribe's possession. While the United States suggests *James* is "flawed," United States Br. at 30, the law in the Ninth Circuit as of 2000 was that the power of even federal courts to serve compulsory process on Indian tribal governments was significantly limited, and state court authority to serve process on Indians as well as tribes on reservations was precluded.

off-reservation crime. *State of Nevada v. Hicks*, 196 F.3d 1020, 1028 (9th Cir. 2000), *rev'd*, 533 U.S. 353 (2001).[32]

There was, finally, no emergency where a quick decision on the spot was required. The Tribe's attorney had advised the district attorney of the Tribe's confidentiality policies and the County's lack of jurisdiction, and a number of less intrusive methods were available for the County to obtain the information. In these circumstances, a reasonable sheriff and district attorney would not have sought and forcibly executed a search warrant.

CONCLUSION

The judgment of the court of appeals should be affirmed.

[32] The County claims that two other decisions—*United States v. Snowden*, 879 F.Supp. 1054 (D. Or. 1995), and *United States v. Velarde*, 40 F.Supp.2d 1314 (D.N.M. 1999)—are inconsistent with the Ninth Circuit's conclusion that the contours of the law were clearly established. County Br. at 43-44. In *Snowden* and *Velarde* however, the courts found that the tribe had voluntarily waived its immunity with respect to the records subject to subpoena. *Snowden*, 879 F.Supp. at 1057; *Velarde*, 40 F.Supp. 2d at 1317.

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(16)

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No. 02-281

In the
Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners

Petitioner Inyo County is a public entity and a County of the State of California. Petitioner Phil McDowell is an individual, and has been sued in both his individual capacity, as well as in the official capacity of the elected District Attorney of Inyo County. Petitioner Dan Lucas is also an individual, and he has also has been sued in both his individual capacity, as well as in the official capacity of the elected Sheriff of Inyo County. Petitioners were the defendants in the District Court, and the appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondent Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony is a federally-recognized Indian tribe. It uses the pseudonym "Bishop Paiute Tribe." The tribe is the sole owner of the respondent Bishop Paiute Gaming Corporation, a tribal corporation formed to conduct the business of a commercial gaming casino in Inyo County, California. The commercial gaming casino does business under the name of the "Paiute Palace Casino." Respondents were the plaintiffs in the District Court, and the appellants in the Ninth Circuit Court of Appeals.

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INTRODUCTION

The core issue here is whether Respondents (or "Paiute") are immune from execution of a state search warrant issued in connection with the investigation or prosecution of off-reservation criminal conduct. They and the United States argue at length that such immunity does exist, although their positions are not entirely consistent. The Paiute, for example, contend that their business premises may not be searched; the United States sees no problem with such premises being searched and objects only to seizure of *tribal* property as a result of the search. The United States additionally asserts that tribes have no immunity from execution of federal warrants; the Paiute are notably silent on this important point.

These differences reflect the difficulty associated with expanding the tribal immunity doctrine to criminal process. That expansion finds no support in this Court's precedent and leads to wholly unacceptable practical results. The Paiute and United States thus would have this Court allow any of the more than 560 Indian tribes, even those with as few as five, seven or eight members, when in possession of exculpatory evidence, to at their discretion (or at the delegated discretion of others) thwart the constitutional rights of an accused, whether an Indian or non-Indian, in a criminal prosecution to due process and a fair trial, and deny the accused his constitutional right to compulsory process for obtaining witnesses or other exculpatory evidence under the Sixth and Fourteenth Amendments. The Government's approach would render this inherent wrong even less justifiable by burdening only state court defendants with the deprivation of these constitutional rights, while permitting federal court defendants to retain them. Their radical interpretation of a concededly questionable doctrine should be rejected.

I. TRIBAL COMMON-LAW IMMUNITY FROM CIVIL SUIT DOES NOT NOW BAR, AND SHOULD NOT BE EXTENDED TO BAR, EXECUTION OF STATE-COURT SEARCH WARRANTS ON OR DIRECTED TO TRIBAL PROPERTY.

A. The Paiute and United States advance an array of arguments in support of their proposition that the court of appeals properly found that execution of the search warrant was barred by tribal immunity from civil suit. In essence, they contend that tribes are immune not only from actual civil suit in state court, but also from any form of state judicial *process* – either criminal or civil – absent congressional or tribal authorization. *E.g.*, Br. Resp. 18; Br. U.S. 20. The Paiute specifically allege that "It is 'settled law' that tribes, as sovereign governments, are immune from judicial process unless the tribe or Congress waives the tribe's immunity." Br. Resp. 9. This is by no means settled, however, and the Paiute fail to cite any authority for this bold statement – other than to refer "for example" to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756 (1998) (which dealt with tribal immunity from civil suit on commercial contracts). Br. Resp. 9.

The United States distinguishes *Nevada v. Hicks*, 533 U.S. 353 (2001) – which it concedes establishes the propriety of executing State search warrants with respect to individually-owned property even if located on reservation land owned or held in trust for a tribe (Br. U.S. 23) – from this case with the observation that "a general rule that state process may be served or executed on an Indian reservation does not mean that a state court may obtain jurisdiction over the Tribe itself, either in a civil suit naming the Tribe as a defendant or in a criminal prosecution of the Tribe, for 'it is settled that a state court may not exercise jurisdiction over a

recognized Indian tribe'" (*id.* 20). For this reason, asserts the United States, "[tribal] property, like the Tribe itself, is immune from attachment or other judicial process, such as a search warrant, issued by a state court." *Id.* 21; *see also* Br. Resp. 23.

The United States attempts to justify this broad view of tribal immunity from search on this Court's decisions that have held tribes immune from civil suit (Br. U.S. 20), and on the asserted notion that "[a] Tribe's interests are qualitatively different when a warrant is directed at the property of the Tribe itself, particularly its own internal documents" because "[s]uch a warrant would threaten 'the political integrity . . . of the tribe[]'" (*id.* 25; *see also* Br. Resp. 13, 34 n.24).

Two fundamental flaws accompany these arguments. *First*, the Paiute and the United States cite no apposite authority for the principle that tribal immunity from civil suit necessarily includes immunity from all manner of judicial "process" in both the criminal and civil law. Indeed, this Court's cases have *never* so held, and, as the Paiute concede (Br. Resp. 18), there is no settled authority in the lower courts on the issue.

Second, the policy justifications cobbled together by the Paiute and United States for extension of what the Court has characterized as a doctrine that "developed almost by accident" (*Manufacturing Technologies*, 523 U.S. at 756) do not withstand scrutiny. Perhaps most telling in this respect is the United States' position that, while State court search warrants and subpoenas are categorically impermissible, federal court warrants and subpoenas are categorically permissible. Br. U.S. 21 n.10, 29-30. Federal warrants and subpoenas, however, are no less "intrusive" than State process issued under comparable constitutional and procedural standards.

B. This Court has addressed directly the question of tribal immunity from suit in a total of six decisions since

the seminal opinion in *Turner v. United States*, 248 U.S. 354 (1919).[1] None involved the situation where a tribe was merely subjected to non-party process, such as a subpoena, or where law enforcement officers had been directed to conduct a search of tribal premises for documents or other property relevant to an ongoing criminal investigation. Rather, in each instance, a tribe or its representative was an actual party to the *civil lawsuit*. These cases thus fit squarely within the traditional rubric "that a suit is against the sovereign if 'the *judgment* sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the *judgment* would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citation omitted; emphasis supplied).

They also reflect, as the Eighth Circuit Court of Appeals reasoned in an early opinion relied upon by *Turner* itself, that the rationale for the doctrine was to exempt Indian tribes "from *civil suit*" because, "[i]f any other course were adopted, the tribes would be overwhelmed with civil litigation and judgments." *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908) (civil suit by attorney seeking specific performance of contract to serve as tribe's general counsel) (emphasis supplied); *see also Thebo v. Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895) (affirming dismissal of civil suit, on subject-matter jurisdiction grounds, of claim by tribe's attorney for fees). The "slender reed" rooted in *Turner* (*Manufacturing Technologies.*, 523 U.S. at 757) does not bear the weight of blanket immunity from execution of a search warrant or subpoena for criminal evidence.

Further, as Petitioners have stated previously, the warrant executed in this matter did not hale the Paiute into court seeking affirmative relief in a civil suit; it instead authorized law enforcement officials to conduct a search on casino premises and to seize certain payroll records if found. Br. Pet'rs at 8, 34. The Paiute were not directed to take any action or submit themselves to the jurisdiction of the issuing court. The warrant plainly exercised power over their property—in terms both of access and of potential seizure—but, just as plainly, not personal jurisdiction over them.

This alone is a distinction with a difference, for it parallels the recognized civil law dichotomy between *in rem* and *in personam* jurisdiction, and has constitutional significance. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 331 (1998); *United States v. Ursery*, 518 U.S. 267, 278 (1996).

The distinction also was accorded significance for Indian law purposes in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), where this Court stressed the fact that the Burke Act proviso to section 6 of the General Allotment Act, 34 Stat. 182 (codified at 25 U.S.C. § 349), merely authorized taxation of fee-patented land held by allottees or their tribal successors in interest. 502 U.S. at 264. This Court rejected as inapposite the affected tribes and the United States' reliance on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which held that section 6 did not extend general

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[1] *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420 (2001) (construction contract's arbitration provision); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) (breach-of-contract claim); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991) (counterclaim for uncollected taxes); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (tribal member's claim under the Indian Civil Rights Act); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) (state regulation re on-reservation exercise of treaty fishing rights); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940) (contract-based claim).

state taxation power over such allottees or successors, "because the jurisdiction [under the proviso] is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned." 502 U.S. at 265. Implicit in the Court's holding was the county's right to enforce the tax through, if necessary, foreclosure on the affected properties notwithstanding their ownership by a tribe. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 109 (1998).

This Court's formulation of tribal immunity from civil suit, in short, does not treat all actions or process affecting property as asserting jurisdiction over the property's owner, and shows that the *in rem* nature of a state regulation has a direct impact on whether tribal immunity from civil suit is implicated. *See Cass County*, 524 U.S. at 112 n.3 (noting that the challenged tax "involves only an *ad valorem* tax on land itself"). Given the animating purpose of the tribal immunity doctrine—protection of tribal governments from unlimited civil suit and liability—it makes no sense to extend the doctrine to criminal process that does not assert personal jurisdiction over tribes, does not seek a judgment against them, and does not dispossess them permanently of any property.

It is thus unsurprising that neither the Paiute nor the United States offers apposite decisional support for such an extension. The Paiute instead rely on several decisions that involve the proposition that States possess sovereign immunity against the service of any federal court process; and on other decisions that invoke the federal government's own sovereign immunity from unconsented civil suit in its own courts (which, of course, tribes may also do in *their* own courts). Br. Resp. 18-19. Substantial difficulty attends the Tribe's attempt to analogize tribal immunity from civil suit to the immunity of States confirmed by the Eleventh Amendment, not the least, of course, being that the Eleventh Amendment does not apply to tribes. The further obvious problem is that,

while the cases cited by the Tribe arose in different contexts, the animating immunity concern in each was the potential "*adjudication* of the State's *interest* in property." *California and State Lands Comm'n v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998) (Kennedy, J., concurring) (emphasis supplied); *e.g.*, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (quiet title action seeking in practical effect ownership of navigable lake's submerged lands); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (*in rem* admiralty proceedings directed to shipwreck artifacts in possession of State); *Missouri v. Fiske*, 290 U.S. 18 (1933) (supplemental bill of complaint filed against intervening State to enforce prior *quasi in rem* decree).

No comparable "adjudication" of the Tribe's interest in the seized documents is contemplated by the search warrant here, whose sole purpose is to acquire evidence pursuant to a judicial probable cause determination made in a criminal investigation or prosecution, not to assert a contrary claim to ownership, and where the property is subject to return. *See* Cal. Evid. Code § 1562 (copies of business records admissible into evidence); Cal. Penal Code §§ 1538.5, 1539, 1540 (providing procedures for party whose property has been seized pursuant to warrant to obtain return of property). The underlying object of the search warrant was thus to obtain *information* relevant to possible wrongdoing that was contained in the documents. This fact is implicitly acknowledged by the Paiute in that they identify interference with "control [ling] access to [their] own confidential records" (Br. Resp. 14) as the gravamen of the harm to tribal interests.[2]

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[2] The United States' analysis is similarly problematic. The Government points to lower court decisions that give effect to, or quote tribal constitutional provisions containing, prohibitions against garnishment or

The Paiute's reliance on the Eleventh Amendment decisions for immunity against "any legal process to which the sovereign has not given its consent" (Br. Resp. 18) additionally proves ill-taken because the exception carved out by *Ex parte Young*, 209 U.S. 123 (1908), with respect to prospective relief against State officers, has been recognized applicable to federal court process. *In re Missouri Dep't of Natural Res.*, 105 F.3d 434, 436 (8th Cir. 1997) (civil subpoena *duces tecum*); *cf. In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 295 (7th Cir. 2002) (rejecting assertion, predicated in part on Eleventh Amendment, of lawyer-client privilege by State official in grand jury investigation with respect to communications to State government lawyer).[3]

Counseling against the Tribe's immunity claim, moreover, is the United States' position that the tribal property would be subject to search warrant or subpoena in a *federal* criminal proceeding, re either on- or off-reservation federal crime, or an on-reservation State crime under 18 U.S.C. §§ 1152 or 1153. And this is so notwithstanding that there is no explicit abrogation of tribal immunity from suit in

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attachment of a tribe's property, which are traditional *quasi in rem* remedies. Br. U.S. at 20. A predicate for *quasi in rem* relief is establishing a claim against the property's owner that entitles the complainant to dispossess the owner of *title* to the property. *See generally Restatement (Second) of Judgments* § 32 (1982). Such relief, again, is not at issue here.

[3] This Court has noted the possibility that tribal immunity from suit does not extend for any purpose to claims against individual officers. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). There is no reason to believe tribal officials enjoy immunity against prospective relief exceeding that established with respect to state officers.

the Federal Rules of Criminal Procedure. *Cf. Citizen Band Potawatomi*, 498 U.S. 508-09 (Fed. R. Civ. P. 13(a) does not abrogate tribal immunity against mandatory counterclaims). Petitioners agree with the Government on this score but do so on the ground that no immunity requiring abrogation in the first place exists with respect to evidence-gathering process, such as subpoenas *duces tecum* or search warrants.[4] Any other conclusion results in the anomaly of State court defendants being denied access to exculpatory evidence when similarly-situated federal court defendants would not be, and States being denied information material to determining whether to expose an individual to criminal prosecution when the United States would not be. Regardless of whether this anomaly must be accepted as a Supremacy Clause or other constitutional matter where a federal agency or official possesses the relevant evidence, it ought not be fostered by a purely judge-made rule. *See generally* Milton Hirsh, *"The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen*, 30 Fla. St. U.L. Rev. 81, 135 (2002) ("the inability of a state defendant to enforce his subpoena frustrates

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[4] Lower courts have varying views on this issue in both criminal and civil litigation. *Compare United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992) (tribal immunity found); and *Catskill Devel., L.L.C. v. Park Place Enter. Corp.*, 206 F. Supp. 2d 78, 86-87 (S.D.N.Y. 2002) (same), *with United States v. Velarde*, 40 F. Supp. 2d 1314, 1316-17 (D.N.M. 1999) (no immunity); and *United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995) (same). The decisions finding no immunity did not rely on the abrogation under the federal rules but instead found denial of access to tribal records inconsistent with due process and other constitutional guarantees or the existence of criminal jurisdiction over Indian country generally. *Velarde*, 40 F. Supp. 2d at 1315-16; *Snowden*, 879 F. Supp. at *id.*; *see also United States v. Boggs*, 493 F. Supp. 1050, 1054 (D. Mont. 1980).

more than that defendant's constitutional rights; it also frustrates the state court's truth-seeking function").

The analogy drawn by the United States between a State's inability to serve process on the Federal Government within federal enclaves and on an Indian tribe within its reservation is inapt. Br. U.S. 22-23. The Constitution and laws in pursuance thereof are superior to State laws by virtue of the Supremacy Clause; and "the activities of the Federal Government are free from regulation by any state" absent congressional authorization. *Mayo v. United States*, 319 U.S. 441, 445 (1943). Tribes, in contrast, have no Supremacy Clause rights, and are subject to nondiscriminatory state law with respect to conduct outside the reservation unless Congress explicitly provides otherwise. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Even within the reservation, they are subject to state regulation in certain circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). Tribal sovereign immunity thus differs significantly from United States' immunity not only in its source—judicially-declared federal common law rather than constitutional—but also in its scope, because it is limited to adjudicatory proceedings and leaves state regulatory authority unaffected. *Manufacturing Techs.*, 523 U.S. at 755 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331-32). There is no statutory authority or precedent for establishing tribal enclaves that parallel federal enclaves, and attempting to do so would result in confusion and conflict with the Court's established jurisprudence in matters of tribal self-governance, its limitations, and the limited retained civil authority of tribal governments to regulate activities of nonmembers – here State law enforcement officers – upon the reservation. *E.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 538 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

C. The Paiute and the United States suggest,

directly or indirectly, several policy justifications for extending tribal immunity from civil suit to enable tribal prohibition of a state court search warrant. They include most notably interference with tribal self-governance, the compromise of confidential information, and the potential for state officers to secure evidence through consensual arrangements with tribes, or through prevailing on federal agencies to use their investigative or enforcement authority. Br. Resp. 27-34; Br. U.S. 25-27. Petitioners do not dispute the underlying values embodied in these suggestions, but they do not merit unvarnished immunity from the execution of a state search warrant.

This Court has established flexible preemption standards designed to vindicate "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1958); *see Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980) ("[t]he principle of tribal self-government...seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"). This was precisely the standard applied in *Hicks*, and although the fact that the onus of the search warrant falls on tribal, not member, property may be germane to assessing the relative strength of the Tribe's interests, it does not support the categorical approach adopted below. As discussed above, significant rights depend upon the availability of criminal process; however, the Tribe and the United States ignore them and discount them to zero. This Court should not subscribe to such a result absent Constitutional compulsion – and there is none here.

As for confidentiality concerns, no persuasive argument can be advanced for the proposition that search warrants issued on probable cause or subpoenas will compromise unduly confidential or otherwise privileged communications. Federal and State courts routinely address

and resolve comparable concerns in the course of overseeing civil and criminal proceedings. Nonparties in California criminal proceedings, for example, may intervene for the purpose of asserting a privilege with respect to documents seized under a warrant. *E.g.*, *People v. Superior Court (Laff)*, 23 P.3d 563 (Cal. 2001); *see also Gravel v. United States*, 408 U.S. 606 (1972). Petitioners further feel compelled to observe that the concerns expressed in this regard encompass any judicial proceeding, and that it is therefore striking for the United States to suggest that, while federal courts presumably are institutionally capable of adjudicating these privilege issues, State courts are not.

Lastly, Petitioners have the responsibility to enforce California criminal statutes with respect to conduct by any person, regardless of Indian status. This duty extends not only to territory outside the Paiute's reservation but also to the reservation itself by virtue of 18 U.S.C. § 1162. This responsibility is shared by numerous other counties and law enforcement personnel in the State with respect to other reservations. It is, of course, conceivable that cooperative agreements over matters such as execution of search warrants can be reached with some—and perhaps many—tribes, but mandatory criminal investigatory functions simply cannot be compromised by either the delay attendant to case-specific or en masse negotiation of such arrangements or the possibility that negotiations will prove unsuccessful. [5]

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[5] Petitioners do not suggest that § 1162 authorizes Public Law 280 States to enforce criminal laws against Indian tribes themselves. The statute refers only to "Indians." 18 U.S.C. § 1162(a). The absence of such an authorization may or may not have bearing on the question of whether a tribe, as opposed to a tribal officer, can commit a criminal offense. *Cf. United States v. Price*, 383 U.S. 787, 805 (1966) (noting congressional debate on the Fourteenth Amendment that acknowledged "the States as such were beyond the reach of the punitive process, and that the legislation must therefore operate upon individuals"). The possibility that tribes may not be capable of committing a crime does not mean, however, that their property can never be relevant to possible criminal conduct or subject to search and seizure in the same manner as other nonparties. Any other conclusion creates an enforcement gap under Public Law 280 that would not exist were the United States proceeding under § 1152 or § 1153—a result which Congress obviously did not intend given § 1162(c).

II. THE TRIBE'S ATTEMPT TO ESTABLISH AN EXEMPTION FROM EXECUTION OF STATE SEARCH WARRANTS UNDER *WILLIAMS V. LEE* SHOULD BE REJECTED.

A. The Paiute ask this Court to sanction a *per se* prohibition on the execution of State court-issued search warrants upon "the Tribe and its property" under the state law infringement preemption standard in *Williams v. Lee*, 358 U.S. 217, 220 (1959)—"the right of reservation Indians to make their own laws and be ruled by them." Br. Resp. at 24. They contend that "[a] more direct threat to a tribe's self-governing powers and political integrity can hardly be imagined than the seizure of tribal property...in violation of tribal policies protecting the confidentiality of tribal records." *Id.* 27. Those policies forbid the disclosure of personnel records without the employee's written authorization. *Id.* 1-2. The Paiute advance this claim without reference to the balancing of State, federal and tribal interests required when *Williams*-based preemption is alleged. *See* Br. Pet'rs 27-31 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); and *Nevada v. Hicks*, 533 U.S. 353, 364 (2001)). They plainly err in so doing.

In the related context of federal law-based preemption under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court explicitly eschewed adoption of such a

categorical approach other than "[i]n the special area of state taxation of Indian tribes and tribal members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.17 (1987); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258-59 (1992). The Paiute cite no authority for the proposition that tribal records, or at least common payroll records related to both tribal and non-tribal gaming casino employees, should be exempted automatically from State process as an impermissible infringement on tribal authority. To be sure, independent federal legislation may achieve that objective, subject to Tenth Amendment/Constitutional scrutiny and perhaps challenge, but the Paiute's lengthy treatment of various statutes that extend confidentiality to employer or governmental records identifies no such legislation that applies here. Br. Resp. 27-32.[6]

B. *Hicks* teaches that the question raised by the Tribe's *Williams* claim is whether the requisite "'accommodation'" of State, federal and tribal interests leads to the conclusion that enforcement of the search warrant *in this matter* improperly trenched upon tribal self-governance rights. *Hicks*, 533 U.S. at 362. The State interest in enforcement of criminal process within Indian country with respect to alleged off-reservation crimes is exceedingly strong. *See* Br. Pet'rs 30-32.

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[6] Just as important, the Paiute fail to explain what those statutes have to say about the inherent *tribal* authority that the *Williams* standard is aimed at protecting. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *accord Hicks*, 533 U.S. at 360-61. Had any of the statutes relied upon by them been applicable, the Tribe instead could have pursued whatever remedies were available to remedy violation of the particular *statute*. It is nonetheless unsurprising that they adopt this categorical tack given *Hicks*' dispositive reasoning and result.

Not only does the presence of this State interest and authority prevent a reservation from becoming "'an asylum for fugitives from justice'" (*Hicks*, 533 U.S. at 364)—*i.e.*, a locus beyond the reach of ordinary State law enforcement processes—but the absence of such authority also would interfere, in certain cases at great prejudice, with the ability of both State prosecutors and defendants to marshal evidence probative of guilt or innocence. So, as discussed above, the records seized from the tribal shed possessed the potential to exculpate and not simply to inculpate the involved employees. The rule proposed by the Paiute thus would leave the availability of fundamental constitutional rights, such as under the Sixth Amendment and Fourteenth Amendment, as well as the exercise of the police power of the States, to the sole discretion of tribal or tribal-delegated decision-makers. The Paiute's characterization of a State's gathering of facts that bear upon a tribal member employee's or nonmember employee's potential criminal culpability under State law as a "direct threat" to tribal political integrity cannot obscure the weighty interests dependent upon the unencumbered operation of criminal procedural mechanisms.

The fact that California possesses mandatory criminal jurisdiction over Indian country crimes under 18 U.S.C. § 1162 also weighs heavily against the Tribe. The impetus for § 1162's enactment was to improve law enforcement on reservations by extending the specified States' criminal laws and processes to Indian country and thereby to create a seamless and integrated criminal justice enforcement regime. *See generally* Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1659 (1998). It runs counter to common sense to suggest that Congress intended a State's ability to police Indian country crimes to be *less* robust than would be the Federal Government's under 18 U.S.C. §§ 1152 and 1153, and it makes no more sense to suggest that a State's

power to enforce its laws with respect to off-reservation crimes should be less robust than with respect to on-reservation offenses. The symmetry of on-reservation and off-reservation state law enforcement authority envisioned by Public Law 280 thus gives federal weight to the State interest.[7]

The Paiute's claimed self-government interest is correspondingly weak. First, the search warrant did not attempt to regulate the membership relationship between Respondents and the affected employees; it only sought to acquire certain payroll records. Second, the tribal policy at issue is unrelated to matters of "internal" governance, for the Paiute admit that many of the approximately 140 casino employees are nonmembers. Br. Resp. 3. Third, the records themselves did not deal with tribal self-government or "internal relations" (*Hicks*, 533 U.S. at 364) even as to tribal members; they were instead common payroll records generated and used solely for commercial business purposes. Br. Resp. 2. Fourth, the Tribe's asserted confidentiality requirement is unconnected with internal governance, for it is simply one feature of an employment policy that applied to members and nonmembers alike and can be waived at the *employee's* discretion. No practical difference therefore exists between this matter and *Hicks*, since in both cases the

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[7] Respondents argue that California's Public Law 280 jurisdiction, together with other federal law, will preclude reservations from becoming "lawless enclaves." Br. Resp. 38-41. Petitioners do not disagree. The issue, however, is whether criminal evidence or proceeds of crime will be allowed to rest free from search if a tribe so desires, and whether the core procedural tool of the authority to issue search warrants directed to the property of persons or entities with potentially material evidence – either inculpatroy or exculpatory – will be compromised, with a concomitant adverse impact on the State's ability to discharge responsibilities with respect to both on- and off-reservation law enforcement.

individual member ultimately controlled access to the material or objects sought by the warrant. Respondents' *Williams*-based claim fails.[8]

III. NO RIGHTS PROTECTED UNDER 42 U.S.C. § 1983 ARE IMPLICATED BY TRIBE'S CLAIM.

A. The Paiute initially suggest that their "person" status for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 is not properly before this Court because the issue was not raised below. Br. Resp. 41-42. They are incorrect.

The Ninth Circuit raised and decided, *sua sponte,* the issue of whether the Tribe may state a claim for violation of its civil rights arising from the alleged unlawful search. It did

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[8] The claim by Respondents that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, independently preempted execution of the search warrant merits brief mention. Br. Resp. at 35-38. This theory was rejected by the district court (JA 138-39) and the court of appeals (Pet. 26a, 43a). Insofar as Respondents seek to modify the judgment below on this issue, their claim is barred jurisdictionally for failure to seek review through a petition or cross-petition for writ of certiorari. *E.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). In any event, the lower courts were plainly correct. *Cf. Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 485 n.5 (9th Cir. 1998) (rejecting IGRA-based preemption claim directed to state records disclosure law given statute's silence). Respondents' claim under IGRA is flawed further because the statute does not create an implied private right of action and Respondents possess no enforcement rights under 42 U.S.C. 1983. *E.g., Hartman v. Kickapoo Tribal Gaming Comm'n*, No. 01-3400, 2003 WL 294982, at *2 (10th Cir. Feb. 11, 2003); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256 (9th Cir. 2000); *Florida v. Seminole Tribe*, 181 F.3d 1237, 1248 (11th Cir. 1999); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

this when it determined that Petitioners *violated* the Fourth Amendment. Pet. 6a, 42a. (It presumably meant the Due Process Clause of the Fourteenth Amendment. *See Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).) Implicit in this ruling is a determination that the Tribe is a "person" with due process rights under section 1 of the Fourteenth Amendment. As a result, all arguments addressing these issues are properly before this Court, whether or not they were a subject of the proceedings below. *Virginia Bankshares, Inc. v. Sandburg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

Equally important, Petitioners' claim that the Paiute have *no* rights under the Due Process Clause presents the question whether they allege injury in fact to an interest within the zone of those protected by the Clause. *E.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992). This standing challenge implicates subject matter jurisdiction, cannot be waived, and may be raised at any time. *Id.* at 465 (Scalia, J., dissenting); *see also City of East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (8th Cir. 1993). Indeed, this Court has an independent obligation to assure itself that such jurisdiction exists. *E.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998).

No one disputes, moreover, that the term "person" in § 1983 is bound inextricably to the same term in the Due Process Clause and that, if the Paiute are not "persons" within the scope of the latter, they are not "persons" under the former. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *see* Br. U.S. 9-10. Accordingly, all of these issues are properly before the Court.

B. The merits of the Paiute's argument on "person" status require little comment in addition to the prior discussion in Petitioners', California's, et. al., and the United States' briefs.

The Paiute's claim that a State can be a proper § 1983 plaintiff when suing in a *parens patriae* capacity (Br. Resp. 43), is not relevant as the Tribe is not suing in such capacity.

The Paiute's claim that while individual Indians were not intended to be "persons" within the meaning of the citizenship clause of Section 1 of the Fourteenth Amendment, nor "persons...subject to the jurisdiction" of the United States thereunder (Br. Resp. 43-44), but that Indian tribes were somehow "surely within the jurisdiction of the United States" pursuant to the Indian Commerce Clause (Br. Resp. 44), confuses the right to regulate commerce *with* someone (here the Tribes) with the exercise of *jurisdiction over* them. Further, foreign nations, which are subject to the parallel Interstate Commerce Clause, have been determined not to have standing to maintain an action under § 1983. *Breard v. Greene*, 523 U.S. 371, 378 (1998).

The Paiute's claim that because *Georgia v. Evans*, 316 U.S. 159 (1942), and the Sherman and Clayton Acts, support the proposition that the term "person" includes States or foreign governments, and that therefore tribal governments should be included within the meaning of "person" in § 1983, is without merit. The statutory definition of the term "person" in those acts was drafted for that specific legislation – not for § 1983. The Paiute's reliance on *Evans* also effectively asks this Court to read the same term differently depending upon whether a tribe is a plaintiff or a defendant. That proposed reading of the antitrust statutes has been rejected (*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978)), and the Paiute advance no grounds for a different result where § 1983 liability is at stake.

Even if "person" status was present for § 1983 purposes, the Tribe's claim of possessing a right or immunity secured by the "Constitution and laws" that supports a § 1983 action is meritless. Br. Resp. 47-48. It is settled that, although the Indian Commerce Clause is a source of federal power, it is the Supremacy Clause that serves as the basis for invalidating State law where tribal self-government has been infringed upon impermissibly. *Compare Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 845 (1982) (rejecting United States' suggestion that "we modify our pre-emption analysis and rely on the dormant Indian Commerce Clause"), *with Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). Because the Supremacy Clause "'is not a *source* of any federal rights'" (*Golden State Transit*, 493 U.S. at 107 (emphasis supplied)), it provides no basis for § 1983 relief.

The Paiute's claim that the term "laws" in § 1983 includes federal common law-based rights likewise is supported by no apposite authority. Br. Resp. 47. The reason is plain: "Laws" refers to statutes adopted by Congress. *E.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)("the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

Finally, the Paiute's invocation of IGRA as a basis for § 1983 relief is foreclosed jurisdictionally and lacks substantive merit. *See* n. 8 *supra*.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY, PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY, DAN LUCAS, INDIVIDUALLY AND AS SHERIFF, PETITIONERS

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

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QUESTIONS PRESENTED

1. Whether an Indian Tribe and a corporation established by the Tribe to operate Class III gaming pursuant to a tribal-state compact under the Indian Gaming Regulatory Act are "person[s]" entitled to sue under 42 U.S.C. 1983.

2. Whether state law-enforcement officers had the authority to seize records of the tribal corporation pursuant to a warrant issued by a state court in connection with an investigation of alleged state-law welfare fraud offenses committed by employees of the corporation.

3. Whether, if respondents may sue under 42 U.S.C. 1983, the state law-enforcement officers who executed the search warrant are entitled to qualified immunity.

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In the Supreme Court of the United States

No. 02-281

INYO COUNTY, CALIFORNIA, A PUBLIC ENTITY, PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY, DAN LUCAS, INDIVIDUALLY AND AS SHERIFF, PETITIONERS

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

INTEREST OF THE UNITED STATES

The United States has a strong interest in effective law enforcement in Indian country, over which the National Government, the States, and the Tribes occupy overlapping spheres of authority, as well as in the surrounding community. The United States, in accordance with its "policy of supporting tribal self-government and self-determination," *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 & n.20 (1985), also has an interest in assuring that state law-enforcement authorities, when investigating crimes over which they have jurisdiction, do not unnecessarily intrude into a Tribe's sovereign ability to govern its members and its territory.

STATEMENT

1. The Bishop-Shoshone Indians of the Bishop Community (Tribe) is a federally recognized Tribe located on the

Bishop Paiute Reservation in California.[1] The Bishop Paiute Gaming Corporation (Corporation) is a corporation chartered and wholly owned by the Tribe. The Corporation operates and manages the Paiute Palace Casino (Casino) under a tribal-state compact approved by the Secretary of the Interior under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Pet. App. 12a.

In February 2000, the Inyo County District Attorney's Office asked the Casino for the employment records of three of its employees in connection with an investigation into whether they had committed welfare fraud by receiving public assistance in excess of the amount to which they were entitled in light of their employment by the Casino. The Tribe responded that, in accordance with its privacy policy, the records would not be released without the employees' consent. Pet. App. 12a.

In March 2000, the District Attorney obtained a search warrant from the Inyo County Superior Court authorizing a search of the Casino for payroll records of the three employees. On March 23, 2000, the Inyo County Sheriff and the District Attorney executed the warrant. At the time of the search, tribal officials asserted that the state court did not have jurisdiction to issue a warrant authorizing a search of premises and seizure of records belonging to a sovereign Tribe. The Sheriff and the District Attorney used deadbolt cutters to clip the locks off of the storage facility that contained the Casino's personnel records. They seized timecard entries, payroll registers, and payroll check registers relating to the three employees, as well as information contained in the Quarterly Wage and Withholding Reports that the Corporation had submitted to the State. Pet. App. 12a-14a, 45a.[2]

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[1] The Bishop Paiute Tribe possesses all "immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 67 Fed. Reg. 46,328 (2002).

[2] Respondents do not appear to dispute that the warrant was supported by probable cause.

In July 2000, the District Attorney's Office informed the Tribe that it wished to obtain personnel records for six additional employees. In response, the Tribe reiterated its privacy policy, but offered to accept as evidence of consent a redacted copy of the last page of each employee's signed welfare application. The District Attorney refused the offer. Pet. App. 14a.

2. a. In August 2000, before any additional searches were conducted, the Tribe and the Corporation filed suit in federal district court against the District Attorney and the Sheriff, in their individual and official capacities, and against the County, seeking injunctive and declaratory relief. The complaint also sought damages under 42 U.S.C. 1983 for alleged violations of the plaintiffs' civil rights secured by the Fourth and Fourteenth Amendments and of the Tribe's right to self-government. Pet. App. 14a, 44a-45a; Compl. ¶¶ 33-39.

b. The district court dismissed all claims against all defendants. Pet. App. 44a-66a. The court held that the Tribe's sovereignty did not preclude the search and seizure of the Casino's personnel records. The court noted that "the Supreme Court has refused to apply a per se rule that would exclude state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at 60a-61a. The court, after weighing the competing interests of the State and the Tribe, concluded that, "[i]n the interest of a fair and uniform application of California's criminal law, state officials should be able to execute search warrant[s] against the tribe and tribal property." *Id.* at 62a. The court also held that the District Attorney and the Sheriff were entitled to qualified immunity from suit in their individual capacities. *Id.* at 57a-58a.

c. The court of appeals reversed. Pet. App. 1a-43a. The court held that "execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 20a (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). The court relied, in part, on circuit precedent that it characterized as

holding that "a subpoena issued against a tribe * * * cannot be enforced because of tribal immunity." *Id.* at 21a (citing *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993)). The court held that the district court had erred by balancing the interests of the Tribe and the State to determine whether the warrant was enforceable, stating that "the Supreme Court has adopted a more categorical approach denying state jurisdiction * * * over a tribe absent a waiver by the tribe or a clear grant of authority by Congress." *Id.* at 22a.

In the alternative, the court of appeals held that, "even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe." Pet. App. 23a. With respect to the Tribe's interests, the court observed that the Tribe's privacy policies "promote tribal interests, such as accuracy in tribal records, confidentiality of members' personal information and a trusting relationship with tribal members," and "affect the Casino, the Tribe's predominant source of economic development revenue." *Ibid.* The court acknowledged the State's countervailing "interest in investigating potential welfare fraud," but suggested that the State could do so "through far less intrusive means." *Id.* at 23a-24a.

In addition, the court of appeals held that the District Attorney and the Sheriff were not entitled to qualified immunity. Pet. App. 2a-7a. The court concluded that "a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction." *Id.* at 7a.[3]

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[3] The court of appeals noted that, although circuit precedent precluded the Tribe from bringing a claim under 42 U.S.C. 1983 for a violation of its "right to tribal self-government," the Tribe's claim that the defendants violated the Fourth Amendment by executing a search warrant "in excess of [their] jurisdiction" was actionable under Section 1983. Pet. App. 6a n.4.

SUMMARY OF ARGUMENT

I. The Tribe is not a "person" who may sue and be sued under 42 U.S.C. 1983. This Court has held that the term "person" in Section 1983 does not encompass sovereigns such as States and foreign Nations. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 69-70 (1989). The same interpretive presumption applies to Indian Tribes, which are recognized as sovereigns under our constitutional structure and shared national history. The Corporation, as an "arm" of the Tribe, also is not a "person" within the meaning of Section 1983. The Corporation was established by the Tribe to conduct gaming under IGRA. Consistent with IGRA's requirements, the Tribe has sole proprietary interest in and responsibility for the Corporation's activities, controls its Board of Directors, budget, and policies, and must approve any waiver by the Corporation of its own sovereign immunity. Tribal law also provides that the Corporation's net revenues shall be devoted exclusively to the purposes authorized by the Tribe.

II. As a general matter, a State has jurisdiction to investigate and prosecute crimes committed on a reservation by and against non-Indians, as well as crimes committed off the reservation by tribal members. State law-enforcement officers, when investigating and prosecuting crimes within their criminal jurisdiction, generally may enter tribal land to execute state process. However, the State's authority to issue process against individuals and individual property on tribal land does not extend to the issuance of process directed at the Tribe itself or the Corporation, or the seizure of their property. Absent a waiver or congressional authorization, the Tribe is immune from suit in any court, including state court. It follows that a state court cannot obtain jurisdiction over the property of the Tribe through attachment or seizure.

That conclusion is supported by reference to the parallel context of federal enclaves. A state court may issue a writ of attachment against personal property located on a federal

enclave but belonging to a private individual. But the same is not true for property of the United States and its instrumentalities, which are immune from the jurisdiction of state courts. Similarly, the conclusion that property of the Tribe and its instrumentalities is not subject to state process is supported by established principles of Indian law. The execution of a search warrant directed at internal tribal documents may threaten the political integrity of the Tribe by undermining the tribal government's decision that such documents should remain confidential, disrupting the operations of the tribal facility at which the search occurs, and exposing internal tribal deliberations and investigations.

III. Even if the Tribe and the Corporation could state a valid Section 1983 claim, the individual petitioners would be entitled to qualified immunity. There is no "clearly established" law prohibiting state law-enforcement officers, when investigating a crime over which they have jurisdiction, from executing an otherwise valid search warrant directed at tribal documents on tribal property.

ARGUMENT

I. THE TRIBE, AS A SOVEREIGN, AND THE CORPORATION, AS AN ARM OF THAT SOVEREIGN, ARE NOT "PERSONS" WHO MAY SUE AND BE SUED UNDER 42 U.S.C. 1983

The Tribe and the Corporation cannot state an actionable claim under 42 U.S.C. 1983, regardless of whether the search and seizure of the tribal employment records were unlawful. That is because neither the Tribe nor the Corporation is a "person" who may sue and be sued under Section 1983.

Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983. It thus permits only a "citizen" or "other person within the [United States'] jurisdiction" to be a plaintiff in a Section 1983 suit, and permits only a "person" to be a defendant.

This Court has held that the term "person" in Section 1983 does not encompass sovereigns such as States, see *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 69-70 (1989), and foreign Nations, see *Breard* v. *Greene*, 523 U.S. 371, 378 (1998) (per curiam). Cf. *Ngiraingas* v. *Sanchez*, 495 U.S. 182 (1990) (a Territory is not a "person" under Section 1983). The Court has also held that the term "person" in Section 1983 excludes "arms" of a sovereign. See *Will*, 491 U.S. at 70 (citation omitted). By parity of reasoning, the Tribe, and the Corporation as an arm of the Tribe, are likewise not "persons" under Section 1983.

A. A Tribe, Like A State, Is Not A "Person" Within The Contemplation Of Section 1983

1. In *Will*, the Court held that "a State is not a 'person' within the meaning of § 1983." 491 U.S. at 65. The Court began its analysis with "the often-expressed understanding that in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Id.* at 64 (internal quotation marks omitted). The Court found that nothing in the statutory text, purpose, or history provided a reason to depart from that understanding. *Id.* at 64-70. To the contrary, the Court explained that construing the term "person" to exclude the States was particularly appropriate when, as in Section 1983, a contrary construction would "subject[] the States to liability to which they had not been subject before," without any clear indication that Congress so intended. *Id.* at 64; cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) (applying, in con-

text of *qui tam* suit under False Claims Act, "our longstanding interpretive presumption that 'person' does not include the sovereign," which "may be disregarded only upon some affirmative showing of statutory intent to the contrary").

Will concerned whether a State or a state agency is a "person" that could be a defendant in a Section 1983 suit. Although the Court has not addressed whether a State is a "person" that could be a plaintiff in a Section 1983 suit, Congress is presumed to have intended that a term have the same meaning throughout the statute in which it appears. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (noting that the presumption is "most vigorous when a term is repeated within a given sentence"). The Court has since held, citing *Will*, that a foreign nation "is not authorized to bring suit under § 1983," because it "is not a 'person' as that term is used in § 1983." *Breard*, 523 U.S. at 378; cf. *Stevens*, 529 U.S. at 787 n.18 (reserving question whether States may be "persons" entitled to bring *qui tam* suits under False Claims Act).

2. Indian Tribes, like States (and unlike, for example, municipal governments, see *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978)), are also sovereigns under the constitutional structure, albeit sovereigns of a distinct and dependent character. See pp. 15-16, *infra*. The Constitution expressly refers to the "Indian Tribes," Art. I, § 8, Cl. 3, and the sovereignty of the Tribes has been recognized throughout the Nation's history. See, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Article VI of the Constitution, "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties"); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-757 (1866). Accordingly, the "interpretative presumption that 'person' does not include the sovereign," *Stevens*, 529 U.S. at 780, properly applies to Tribes as well as to States in this context.

Nothing in the text, purpose, or history of Section 1983 operates against that presumption. To the contrary, the

context in which Section 1983 was enacted confirms that Congress did not understand the statutory reference to "person[s]" within the United States' jurisdiction to encompass Indian Tribes.

In 1870, shortly after the ratification of the Fourteenth Amendment, the Senate Judiciary Committee, at the direction of the full Senate, considered whether the Amendment applied to Tribes and tribal members. S. Rep. No. 268, 41st Cong., 3d Sess. (1870). In particular, the Committee was concerned with the question whether tribal members were covered by the Amendment's conferral of citizenship on "[a]ll persons born or naturalized in the United States, *and subject to the jurisdiction thereof*"—a question that the Committee understood could be answered "only * * * by determining the status of the Indian tribes at the time the amendment was adopted." *Id.* at 1. The Committee examined the status of the Tribes since the time of the European discovery and concluded that the Tribes retained aspects of their sovereignty, including "the right to regulate, without question, their domestic affairs, and make and administer their own laws, provided in the exercise of such right they should not endanger the safety of the governments established by civilized man." *Id.* at 2. In addition, the Committee noted that the Fourteenth Amendment's provision for congressional apportionment "counting the whole number of persons in each State, excluding Indians not taxed," indicated that the Amendment was intended to confer citizenship on former slaves (who had previously been counted as three-fifths of a person), but not on Indians. *Id.* at 10. Thus, the Committee concluded, without "hesitat[ion]," that "the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, '*subject to the jurisdiction*' of the United States; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment." *Id.* at 10-11; see *Elk* v. *Wilkins*, 112 U.S. 94

(1884) (holding that the Fourteenth Amendment did not grant citizenship to tribal members).

Four months after the report was published, Congress, acting pursuant to its authority to enforce the Fourteenth Amendment, enacted the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, which contained the precursor to Section 1983. See *Will*, 491 U.S. at 66; see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (noting that the Civil Rights Act of 1871 was enacted "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment'") (quoting *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 545 (1972)). In its original form, the provision authorized suit by "any person within the jurisdiction of the United States." 17 Stat. 13. Congress's use of that terminology in Fourteenth Amendment legislation, against the backdrop of the Senate Judiciary Committee's recent determination that Tribes and tribal members were not "persons subject to the jurisdiction" of the United States under the Fourteenth Amendment, indicates that Congress did not consider Tribes to be persons who could sue (or be sued) under Section 1983.[4]

In the intervening years, individual Indians have been granted full United States citizenship by Congress, without regard to their continuing tribal affiliation. See Act of June 2, 1924, ch. 233, 43 Stat. 253. They, like other "citizens," may now sue under Section 1983. At the same time, however, Congress and the Executive have continued to treat the Tribes themselves as sovereigns, and sovereigns are not, as

[4] In the 1874 revision and recodification, Congress altered the language governing who may sue under Section 1983 to "citizen[s] * * * or other person[s] within the jurisdiction" of the United States. Rev. Stat. § 1979. It is not clear why Congress made that revision. Congress made other revisions in 1874 that are similarly unexplained. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980) (addition of phrase "and laws"); *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.11 (1973) (addition of phrase "or Territory").

Will and *Breard* recognize, among the "persons" who may sue and be sued under Section 1983.[5]

B. A Tribal Casino Corporation, As An Arm Of The Tribe, Is Likewise Not A "Person" Under Section 1983

As the Court held in *Will*, the term "person" in Section 1983 excludes not only a State itself, but also those "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 491 U.S. at 70 (citation omitted). Analogously, because the term "person" excludes a Tribe, it also excludes arms of the Tribe, including a tribal gaming corporation organized under IGRA. In this case, the Corporation has been established by the Tribe to conduct Class III gaming under IGRA, pursuant to a compact between the Tribe and the State of California. See 25 U.S.C. 2710(d).

Whether an entity is an "arm" of the sovereign requires an analysis of such factors as "the nature of the entity created by [the sovereign's] law," *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 & n.5 (1997); the extent to which the entity functions autonomously from the sovereign, see *Moor* v. *County of Alameda*, 411 U.S. 693, 717-721 (1973); and whether the sovereign would be liable for a money judgment against the entity, see *Edelman* v. *Jordan*, 415 U.S. 651, 663-664 (1974). An entity that engages in commercial activities

[5] Two courts of appeals have held, although with little analysis, that Tribes may sue under Section 1983. See *Native Vill. of Venetie IRA Councils* v. *Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *Shakopee Mdewakanton Sioux Cmty.* v. *City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); but see *American Vantage Cos.* v. *Table Mountain Rancheria*, 292 F.3d 1091, 1097 (9th Cir. 2002) (questioning that position in dictum). The Seventh Circuit has stated in dictum that a State cannot sue under Section 1983, see *Illinois* v. *City of Chicago*, 137 F.3d 474, 477 (1998), while the Third Circuit has held that a State may do so in a *parens patriae* capacity, see *Pennsylvania* v. *Porter*, 659 F.2d 306 (1981) (en banc), cert. denied, 458 U.S. 1121 (1982). The claims in this case are not of a *parens patriae* character because the Tribe is seeking to vindicate its own interests as a sovereign, rather than the interests of individual tribal members. See *Alfred L. Snapp & Sons, Inc.* v. *Puerto Rico*, 458 U.S. 592 (1982).

may be an arm of the sovereign for these purposes as well. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Because tribal gaming corporations, such as the Corporation here, may exist only pursuant to the conditions set forth in IGRA, it is appropriate to consider IGRA, as well as tribal law, in analyzing whether the Corporation is an arm of the Tribe. See, *e.g.*, *Gavle* v. *Little Six, Inc.*, 555 N.W.2d 284, 292-296 (Minn. 1996) (relying on congressional intent expressed in IGRA in finding tribal casino to be immune from suit), cert. denied, 524 U.S. 911 (1998); *Trudgeon* v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65 (Ct. App. 1999) (same); cf. *Oklahoma Tax Comm'n* v. *Citizens Band of Potawatomi Indians*, 498 U.S. 505, 510 (1991).

First, with respect to the nature of the Corporation under tribal law, IGRA requires that Tribes, in their own gaming ordinances, provide that the "tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. 2710(b)(2)(A).[6] The Tribe's Ordinance so provides. Gaming Ordinance of the Bishop Paiute Tribe (Ordinance) § 103. The Gaming Compact between the Tribe and the State similarly represents that "[t]he Tribe is currently operating a tribal gaming casino offering Class III gaming activities on its land," authorizes "the Tribe * * * to engage" in the specified Class III gaming, and requires that "[t]he Gaming Operations authorized under this Gaming Compact shall be owned solely by the Tribe." Tribal-State Compact Between the State of California and the Bishop Paiute Tribe (Compact) Preamble C, §§ 3.0, 6.2 (Resps. C.A. R.E. 146, 149, 155). Indeed, in the complaint in this case, respondents identify the Corporation as "a political subdivision of the Tribe" that "share[s]" the Tribe's sovereign immunity. Compl. ¶¶ 2, 8 (Resps. C.A. R.E. 6, 8).

[6] IGRA carves out a narrow exception to this rule for individually owned operations if certain conditions are met. 25 U.S.C. 2710(b)(4). That exception is inapplicable here.

Second with respect to the Tribe's control over the Corporation, IGRA, as noted, requires the Tribe itself to exercise "sole * * * responsibility" for reservation gaming. 25 U.S.C. 2710(b)(2)(A). IGRA also requires the Tribe to assure that the Corporation's gaming revenues are used only for certain specified tribal purposes, such as "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," and "to promote tribal economic development." 25 U.S.C. 2710(b)(2)(B). In this case, under the Corporation's Charter, the Tribal Council appoints, and may remove, the members of the Corporation's Board of Directors. Charter § 4. The Tribal Council must approve the Corporation's annual budget, *id.* § 10, the Corporation's "policies, procedures, rules, and/or by-laws," *id.* § 13, and any waiver by the Corporation of its own sovereign immunity, *id.* § 2A. The Charter requires the Corporation to transfer all funds in excess of its operating budget and reserves to the Tribal Council on a quarterly basis. *Id.* § 11. Furthermore, the Tribe's Ordinance provides that "[t]he net revenues from any games shall be exclusively devoted to the purposes authorized by the BISHOP INDIAN TRIBAL COUNCIL" and shall not be used for purposes other than those specified in IGRA. Ordinance §§ 601, 602.

Third, with respect to the Tribe's liability for a money judgment against the Corporation, because all of the Corporation's net revenues are required under IGRA, the Ordinance, and the Charter to be transferred to the Tribe, any money judgment against the Corporation would necessarily deplete what would otherwise be tribal funds. No doubt for this reason, the Tribal Council, as noted above, must approve any waiver by the Corporation of its immunity from suit.[7]

[7] Corporations organized by Indian Tribes have been recognized to possess sovereign immunity in other circumstances, unless waived by the Tribe or corporation. In the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C.

Under the Gaming Compact, moreover, the Tribe itself is required to maintain liability insurance specifically for casino patron claims. See Addendum A to Compact 3 (Resps. C.A. R.E. 186).

In sum, the Corporation is properly viewed as an arm of the Tribe for purposes of sovereign immunity analysis. And, for that reason, the Corporation, like the Tribe, is not a "person" that can sue and be sued under Section 1983.

II. STATE OFFICERS MAY ARREST INDIVIDUALS OR SEARCH FOR AND SEIZE PRIVATE PROPERTY ON TRIBAL LANDS PURSUANT TO A STATE COURT WARRANT, BUT MAY NOT SEIZE PROPERTY OF THE TRIBE ITSELF OR THE TRIBE'S INSTRUMENTALITIES

For the reasons stated in Point I, neither the Tribe nor the Corporation has a cause of action against petitioners under 42 U.S.C. 1983. The Tribe and the Corporation have asserted other causes of action seeking prospective relief against petitioners, and seek declaratory and injunctive relief under 28 U.S.C. 1331 to vindicate the Tribe's rights under federal law and to establish that state law is preempted to the extent that it purports to authorize the seizure of tribal records. See, *e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-475 (1976); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 665-666 (1974); cf. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850-853 (1985). For that reason, the United States addresses the merits of the Tribe's submission that state officers do not have authority to execute a search warrant to seize records of the Corporation. For the reasons explained below, although state officers, pursuant to a warrant, may arrest an individual Indian or non-Indian on tribal property for the commission of an off-reservation crime, and may search for and seize personal property of an individual as evidence of such a crime even where that property is situated on land owned by or held in trust for the Tribe within the reservation, they may not seize the property of the Tribe (or the Corporation) itself. That proposition follows from (i) the decisions on which this Court relied in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), (ii) the Court's understanding of the term "process" in *Hicks*, (iii) background principles concerning the execution and service of process by state officers on federal enclaves, on which this Court relied in *Hicks*, and (iv) established principles that prohibit States from exercising jurisdiction over an Indian Tribe itself, as distinguished from the exercise of jurisdiction over individual tribal members or non-Indians within the Tribe's reservation.

476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The principal reason for the enactment of Section 17 was a concern that non-Indian entities might be reluctant to enter into commercial dealings with a tribal government because of its immunities, and the separately chartered corporation therefore could provide for a waiver of immunity in appropriate circumstances and under whatever conditions the Tribe and corporation found to be appropriate. See 65 Interior Dec. 483, 484 (1958); R. Strickland et al., *Felix Cohen's Handbook of Federal Indian Law* 325-327 (1982). Charters of incorporation issued under Section 17 of the IRA often contain clauses expressly allowing the corporation to sue or be sued, and such clauses have been construed to waive the immunity of the separate entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Whether such an IRA Section 17 corporation is subject to suit would depend, however, on whether the Tribe or the corporation itself had waived the sovereign immunity that would otherwise attach to the entity.

A. Although Tribes Retain Inherent Sovereignty, States Have Authority Within Indian Country To Investigate Crimes That Are Within Their Prosecutorial Jurisdiction

Indian Tribes, as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (15 Pet.) 17 (1831), retain a significant measure of the inherent sovereignty that they possessed before European discovery and settlement. See *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978) ("[T]ribes still possess those aspects of sovereignty not withdrawn by

treaty or statute, or by implication as a necessary result of their dependent status."). Among the core attributes of inherent sovereignty that Tribes retain, and that are protected by federal law, are those rights, powers, and immunities that are necessary to their survival as self-governing political communities. See, *e.g.*, *Duro* v. *Reina*, 495 U.S. 676, 685-686 (1990) (Tribes retain the "necessary powers of internal self-governance," including those "needed to control their own internal relations," "to preserve their own unique customs and social order," and "to prescribe and enforce internal criminal laws.") (citations omitted).[8]

As this Court has explained, "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361. Thus, as a general matter, a State has jurisdiction to investigate and prosecute crimes committed on a reservation that exclusively involve non-Indians, see *United States* v. *McBratney*, 104 U.S. 621 (1881), although it does not have jurisdiction over crimes involving Indian perpetrators or Indian victims on a reservation. Such crimes are instead within the jurisdiction of the United States, see 18 U.S.C. 1152, 1153, and the Tribe. See *Duro*, 495 U.S. at 680-681 n.1 (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country).

In those States (including California) where Public Law 280 applies, the State has jurisdiction over crimes "committed by or against Indians," as well as crimes involving only non-Indians. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588. See 18 U.S.C. 1162(a). The United States retains the authority, however, to enforce those federal criminal laws, such as those governing mail or wire fraud, firearms, and narcotics, that are generally applicable throughout the

[8] The Tribes thus retain the authority to prosecute Indians for crimes committed on the reservation. See *Wheeler*, 435 U.S. at 326. The penalties that a Tribe may impose, however, are limited to one year's imprisonment, a $5000 fine, or both. 25 U.S.C. 1302(7).

Nation, as well as certain other laws that are specifically applicable in Indian country, see 18 U.S.C. 1154 *et seq.*, such as those intended to protect the financial integrity of the Tribe itself, see, *e.g.*, 18 U.S.C. 1163. Although Public Law 280 also addresses state civil jurisdiction over Indian country, 28 U.S.C. 1360, its civil provisions have been construed narrowly to authorize only the extension of state *adjudicatory* jurisdiction over disputes involving Indians and arising in Indian country. See *Bryan* v. *Itasca County*, 426 U.S. 373, 387-388 (1976). Public Law 280 does not authorize any additional civil regulatory jurisdiction by the State, nor does it waive the Tribes' sovereign immunity from suit. See *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 892 (1986); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In addition, IGRA gives the United States, the State, and the Tribe a role in the regulation of reservation gaming operations. IGRA provides that Class III gaming activities, such as those conducted by the Tribe's Corporation in this case, are lawful on Indian lands only if those activities are (1) "authorized by [a tribal] ordinance" approved by the National Indian Gaming Commission (NIGC), (2) "located in a State that permits such gaming," and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" and approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(l)(A)-(D) and (3). Such tribal-state compacts may provide for the State to exercise "criminal jurisdiction with respect to gambling on the lands of the Indian tribe." 18 U.S.C. 1166(d). In the absence of such a provision in the governing compact, the United States exercises exclusive jurisdiction over violations of state gambling laws on the reservation. *Ibid.*

Finally, as this Court recently reaffirmed in *Hicks*, 533 U.S. at 365-366, a State has authority to prosecute tribal members for violations of its criminal laws *off* the reservation. See *United States* v. *Antelope*, 430 U.S. 641, 647 n.7 (1977); *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392,

397 n.11 (1968). The parties in this case appear to agree that the alleged welfare fraud that petitioners were investigating in this case is properly categorized as an off-reservation crime. In pursuing welfare fraud, a State (or a Tribe) not only enforces its own laws, but also carries out the mandates of the United States.[9] The question here is the scope of the State's authority on the reservation in connection with the investigation and prosecution of such a crime that occurs off the reservation.

B. State Law-Enforcement Officers, When Investigating And Prosecuting Crimes Within Their Jurisdiction, Generally May Enter A Reservation To Execute State Process, But May Not Do So Against The Tribe Itself

1. In *Hicks*, the Court held that a Tribe did not have the authority to regulate state law-enforcement officers who were executing a search warrant in the course of investigating a crime allegedly committed by an individual tribal member outside the Tribe's reservation. That conduct by state

[9] The Temporary Assistance for Needy Families (TANF) program (formerly the Aid to Families with Dependent Children (AFDC) program), which is administered by all States (and some Tribes) under Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.*, is primarily funded through federal block grants. Federal law requires a State to certify as part of its State Plan that it has established and is enforcing standards and procedures to ensure against fraud and abuse. See 42 U.S.C. 602(a)(6), 609(a)(1). A State may be penalized if it does not participate in the Income and Eligibility Verification System, the system used by Inyo County in this case to detect potential instances of unreported income. See 42 U.S.C. 609(a)(4), 1320b-7. Those provisions demonstrate the significant federal interest in state (and tribal) efforts to prosecute welfare fraud.

In addition, the United States seeks to ensure that the jurisdictions with TANF programs cooperate with one another to prevent duplication of benefits. Federal regulations specifically require a Tribe that wishes to implement its own TANF program to include in the Tribal Plan assurances that a family may not receive duplicative assistance, and the Plan "must include a description of the means by which the Tribe will ensure duplication does not occur." 45 C.F.R. 286.75(f). The Department of Health and Human Services has informed this Office that the Owens Valley Consortium, a tribal consortium that includes the Tribe here, operates its own TANF program for tribal members.

officers in *Hicks* took place on the allotted land of the tribal member within the reservation. 533 U.S. at 371. The Court quoted the statement in *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28, 31 (1885), that "[i]t has . . . been held that process of [state] courts may run into an Indian reservation of this kind"—*i.e.*, one that has not been excluded from the territory of a State, see 533 U.S. at 363 n.5—"where the subject matter or controversy is otherwise within their cognizance." *Id.* at 363. The Court also relied on a similar reference in *United States* v. *Kagama*, 118 U.S. 375 (1886), in which it upheld the constitutionality of the Major Crimes Act (which provides federal jurisdiction over enumerated crimes between Indians in Indian country) as an exercise of Congress's power to effectuate its undertaking to protect the Indian Tribes, often specifically as against the States, because the Tribes had become dependent on the United States through a long course of dealing. See *id.* at 383-385. In doing so, the Court in *Kagama* stressed that the law "does not interfere with the process of the State courts within the reservation." *Hicks*, 533 U.S. at 363 (quoting 118 U.S. at 383). These statements in *Utah & Northern* and *Kagama*, the Court noted in *Hicks*, "suggest state authority to issue search warrants in cases such as this"—that is, cases involving search warrants directed at the property of an individual Indian in connection with the investigation of a crime that he allegedly committed outside the reservation. The Court did not suggest that either *Utah & Northern* or *Kagama* would support the issuance of state process running against the Tribe itself or calling for the seizure of property belonging to the Tribe.

Indeed, in *Utah & Northern*, the Court stated, in the sentence preceding the one quoted above referring to the process of state courts, that "[t]he authority of the territory may rightfully extend to all matters not interfering with [the] protection" afforded by the Treaty with the Shoshone Indians. 116 U.S. at 31. One important purpose of any treaty or statute setting aside a reservation for an Indian Tribe is to

afford it a territory within which the Tribe itself can be autonomous and protected from state interference. *Kagama*, 118 U.S. at 384; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879)); see also *McClanahan* v. *Ariziona State Tax Comm'n*, 411 U.S. 164, 171-175 (1973); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985).

2. Furthermore, the Court in *Hicks* noted that the word "process," which was used in both *Utah & Northern* and *Kagama*, is defined as "'any means used by a court to acquire or exercise its jurisdiction over a person or over specific property,' *Black's Law Dictionary* 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085." 533 U.S. at 364. That understanding of "process" does not support the issuance of a warrant or other state-court process running against the Tribe itself or calling for the seizure of property owned by the Tribe. It has long been recognized that an Indian Tribe is immune from suit in any court, including state court, unless Congress has authorized such a suit or the Tribe has waived its immunity. See *C & L Enters.* v. *Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001); *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998); *Three Affiliated Tribes*, *supra*; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). That immunity extends to attachment of the property of a Tribe as well. See *Lineen* v. *Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Maryland Casualty Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1961). Accordingly, a general rule that state process may be served or executed on an Indian reservation does not mean that a state court may obtain jurisdiction over the Tribe itself, either in a civil suit naming the Tribe as a defendant or in a criminal prosecution of the Tribe, for "it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172 (1977). Nor, for the same reasons, may a state court obtain jurisdiction, through attachment or seizure, over the property of a Tribe within a reservation. Such property, like the Tribe itself, is immune from attachment or other judicial process, such as a search warrant, issued by a state court.[10]

3. This conclusion is supported by the Court's reliance in *Hicks* on the parallel context of federal enclaves, in which, the Court noted, "the reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" 533 U.S. at 364 (quoting *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 533 (1885)). Accordingly, under provisions allowing service of state process on federal enclaves, civil process may be served on an individual in a suit arising out of conduct that occurred outside the federal enclave, *Ohio River Contract Co.* v. *Gordon*, 244 U.S. 68 (1917); a state court may issue a warrant for the arrest of an individual charged with a crime outside the enclave, 2 *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Comm. for the Study of Jurisdiction Over Federal Areas Within the States* 121 (1957) (*Report*),[11] and personal property situated on the federal enclave but belonging to a private party may be subject to a writ of attachment issued by a state court, see 14 Op. Att'y Gen. 426 (1874). Morever, the rationale of

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[10] The United States, as a sovereign superior to the States (under the Supremacy Clause) and to the Tribes (under the constitutional structure), may issue and execute process directed at state and tribal property, although the United States ordinarily does not find it necessary to resort to such process. The Tribes' sovereignty, while subordinate to the sovereignty of the United States, is not subordinate to that of the States. Of course, given the United States' superior sovereignty with respect to the Tribes, the court of appeals was mistaken in suggesting that tribal sovereignty would "den[y] the federal government the authority to compel disclosure of tribal documents." Pet. App. 21a (citing *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993)).

[11] The 1957 *Report* explained (at 121-122), however, that "various Federal instrumentalities have regulations governing the manner in which state process may be served, and even in the absence of formal regulations on the subject, the service of process may not be accomplished in a manner so as to constitute an interference with an instrumentality of the Federal Government."

Hicks presumably would permit the issuance of a warrant calling for the seizure within the enclave of contraband or other personal property of an individual suspected of having committed a crime outside the enclave.

These various forms of state process are consistent with and effectuate the exercise of state authority over private persons in connection with their conduct outside the enclave. See J. Story, *Commentaries on the Constitution* 3 § 1220 (1833) ("[G]enerally there has been a reservation of the right to serve all state process, civil and criminal, upon *persons* found therein.") (emphasis added) (quoted in P. Kurland et al., *The Founders' Constitution* 237 (1987)). They therefore support the exercise of parallel authority by a State on an Indian reservation in connection with conduct occurring outside the reservation and over which the State has jurisdiction.[12]

Nothing in the authority to serve process on *private persons*, however, would subject the United States to suit in state court. Nor would it subject the property of the United States within the enclave to attachment by a state court or to seizure pursuant to a warrant issued by a state court, because "[a] proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota* v. *United States*, 305 U.S. 382, 386 (1939); accord *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). The immunities of the United States itself and its instrumentalities from the jurisdiction of the state courts thus remain intact within a federal enclave. Indeed, it follows a fortiori from the very purpose for which such enclaves are established—to ensure

[12] Similarly, state law-enforcement officers, when investigating on-reservation crimes that are within their jurisdiction under Public Law 280 (or another source of authority), may execute state process directed at Indians and Indian property on the reservation. As the Court has noted, Public Law 280 was intended to correct "a hiatus in law-enforcement authority" that had occurred in Indian country, because the United States did not have authority to prosecute all crimes involving Indians, the States did not have authority to prosecute any such crimes, and the Tribes did not have resources to prosecute them. *Bryan* v. *Itasca County*, 426 U.S. at 379-380 (quoting H.R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953)).

freedom from interference by the States—that the property belonging to and used by the federal government within the enclave is not subject to attachment or seizure by a state court. And that purpose would apply with particular force to documents, analogous to those at issue here, that the United States treated as confidential. Accordingly, nothing in this Court's recognition in *Utah & Northern*, *Kagama*, and *Hicks* that state process may similarly extend into an Indian reservation, including for the seizure of Indian and non-Indian individuals and property found therein, suggests that such state process may run against the Tribe itself or against its property. Because the State retains its authority to issue process running against individuals and their personal property within Indian reservations, respect for the core immunities of the Tribe from state process does not undermine the goal, recognized in *Hicks*, to "prevent [such areas] from becoming an asylum for fugitives from justice." 533 U.S. at 364 (quoting *Fort Leavenworth R.R.*, 114 U.S. at 533).

4. *Hicks* arose out of the execution of a search warrant on reservation land held in trust for an individual Indian. But the Court's use of such general terms as "tribal land," 533 U.S. at 355, and "tribe-owned land," *id.* at 371, suggests that the Court did not contemplate any categorical distinction, with respect to the execution of state process, between land owned by or held for the benefit of the Tribe as an entity, and land allotted in trust or fee to an individual tribal member. See *id.* at 387 (O'Connor, J., concurring in part and concurring in judgment) (referring to "land owned and controlled by the tribe").

Nor would such a distinction comport with the assignment to the States of the responsibility to prosecute—and therefore to investigate—significant categories of crime. On some reservations, all of the land may be held in trust for the Tribe itself, including the parcels on which individual tribal members reside. On any reservation, moreover, a crime that the State has jurisdiction to prosecute (*e.g.*, because it involves non-Indians or because Public Law 280 applies) could

occur at a tribal enterprise, or at a tribal housing complex, that is located on tribal land within the reservation. And, even when a crime occurred off the reservation (and thus within the State's jurisdiction regardless of the parties involved), evidence of the crime might be found on tribal property. For example, a tribal member suspected of being involved in an off-reservation crime (such as that at issue in *Hicks*) might reside on tribal rather than allotted land, or contraband or other evidence of the crime might be secreted on tribal land. State officers' ability to investigate and prosecute those crimes that are within their jurisdiction would be severely compromised if they were categorically prohibited from entering and executing state process on all property that is owned by or held in trust for the Tribe itself.[13]

Although state process therefore can run against private persons and their personal property even when they are on tribal premises, the property of the Tribe itself (or of its instrumentalities) remains immune from state process under the rationale of *Hicks*.

5. The conclusion that property of the Tribe itself (or of its instrumentalities) may not be attached or seized pursuant to a warrant or other process issued by a state court also is supported by established principles of Indian law. In *Hicks*, the Court explained that the execution of a state search warrant at a tribal member's residence on the reservation did

[13] A subpoena *duces tecum*, which may be used in some instances instead of a search warrant to obtain documents or other evidence in the hands of a third party, directs that party or its agent to produce the evidence in a judicial or administrative proceeding. A subpoena is generally viewed as a less intrusive means than a warrant for obtaining evidence from a third party (see, *e.g.*, 28 C.F.R. 59.1(b)). Nevertheless, a subpoena directed to a Tribe or tribal officials to obtain property (records) belonging to the Tribe does implicate tribal sovereign immunity. A federal agency or official, for example, is immune from a subpoena for federal records issued by a state court. See *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Edwards* v. *United States Dep't of Justice*, 43 F.3d 312 (7th Cir. 1994); *Boron Oil Co.* v. *Downie*, 873 F.2d 67 (4th Cir. 1989); see also *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

not "directly" implicate tribal "*[s]elf*-government and *internal* relations." 533 U.S. at 371. The Court reasoned that the Tribe's interest in supervising the conduct of state law-enforcement officers executing the warrant—officers who were not members of the Tribe, and who did not derive their authority from the Tribe—was outweighed by "the State's interest in pursuing off-reservation violations of its laws." *Id.* at 370.

The Tribe's interests are qualitatively different when a warrant is directed at the property of the Tribe itself, particularly its own internal documents. Such a warrant would threaten "the political integrity * * * of the tribe," *Hicks*, 533 U.S. at 371 (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)), in a way that a warrant directed at private individuals or their personal property does not. It would override the tribal government's policy choice concerning the confidentiality of its own records, including private information obtained by the Tribe from its members. It could disrupt the operations of the particular tribal facility at which the search occurred. And it could, in some cases, expose internal tribal deliberations and investigations.

Various Acts of Congress that affirm tribal sovereignty and self-government support the conclusion that state courts may not assert jurisdiction over tribal property.[14] Similarly, decisions of this Court suggest that there is an important distinction between the assertion of state jurisdiction over

[14] See, *e.g.*, 25 U.S.C. 1301(1) (defining "Indian tribe" as "any tribe * * * recognized as possessing powers of self-government"); 25 U.S.C. 4101(7) (finding that federal housing assistance should be provided in a manner that "recognizes the right of Indian self-determination and tribal self-governance"); 25 U.S.C. 3601 (finding that Congress has recognized the self-determination and inherent sovereignty of Tribes); 25 U.S.C. 479a note (finding that the United States "has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes"); Exec. Order No. 13,175, 65 Fed Reg. 67,249 (2000) (stating that the "Nation, under the law of the United States * * * has recognized the right of Indian tribes to self- government").

individual Indians who are within the territory of the Tribe on the reservation and assertions of state authority that would interfere with the operations of the Tribe itself. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 126 (1993) (indicating that State could tax income of tribal members who work within Tribe's territory but live outside Indian country, but reserving question whether "the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country"); accord *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 464 (1995).

In many cases, the interest in the integrity of tribal documents extends beyond that of the Tribe itself. Increasingly, Tribes are carrying out governmental functions previously performed by the federal government, pursuant to contracts with the Bureau of Indian Affairs or the Indian Health Service. The United States retains a strong interest in the performance of those functions. Moreover, the United States frequently engages in joint undertakings with tribal governments, including joint criminal investigations involving tribal law-enforcement officers and the Federal Bureau of Investigation, the Bureau of Indian Affairs, the Drug Enforcement Administration, the Border Patrol, and other federal law-enforcement agencies. In districts where many of the cases prosecuted by the United States Attorney's Office arise in Indian country, tribal law-enforcement officers may initiate and investigate the case. Documents and other materials generated in such joint undertakings, like other federal government materials, would be immune from state process in their own right.

6. The recognition of tribal immunity from state process does not prevent state officers from obtaining information in other ways. They can seek state warrants or subpoenas directed to the individuals involved. They can also try to arrive at cooperative solutions with the Tribe. Cf. *Texas* v. *New Mexico*, 462 U.S. 554, 575 (1983) ("Time and again we have counseled States engaged in litigation with one another before this Court that their dispute is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."). In this case, for example, federal regulations would have permitted state officials to share information the Tribe sought concerning the TANF applicants who were the subject of the state investigation, if the Tribe had suitable confidentiality standards, as it apparently did. See 45 C.F.R. 205.50(a)(2)(ii). In the context of Class III gaming operations governed by IGRA, the State can seek information-sharing arrangements as part of the tribal-state compact.

In many instances, moreover, federal agencies having law-enforcement responsibilities on the reservation can be of assistance in a state investigation. With respect to gaming operations, for example, the NIGC "may demand access to and inspect, examine, photocopy, and audit all papers, books and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out [its] duties" under IGRA. 25 U.S.C. 2706(b)(4); see 25 C.F.R. 571.5-571.7. Such "other matters" include Class III gaming. In addition, the NIGC has authority to close or fine any gaming operation for violation of IGRA, its implementing regulations, or the tribal gaming ordinance. 25 U.S.C. 2713. In aid of that authority, the NIGC may require by subpoena the testimony of witnesses and the production of any documents relating to any matter under consideration or investigation. 25 U.S.C. 2715(a); see 25 C.F.R. 571.8-571.10. Consequently, the NIGC's authority extends to all gaming records, including payroll and similar tribal gaming employee records. When the NIGC obtains information indicating a violation of the law, the NIGC turns over the records to the appropriate law enforcement authorities, including state authorities. 25 U.S.C. 2716(b).

III. EVEN IF RESPONDENTS HAD A RIGHT OF ACTION UNDER 42 U.S.C. 1983, THE INDIVIDUAL PETITIONERS WOULD BE ENTITLED TO QUALIFIED IMMUNITY

Even if the Tribe and the Corporation could otherwise state a valid Section 1983 claim, the individual petitioners would be entitled to qualified immunity. Qualified immunity shields government officials from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In order for a plaintiff to overcome the defense of qualified immunity, "[t]he contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987); see *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Even if the Court finds a constitutional violation here that may be vindicated under 42 U.S.C. 1983, that right cannot be said to be clearly established. Cf. *Wilson* v. *Layne*, 526 U.S. 603 (1999) (concluding that searches involving media ride-along violated the Fourth Amendment, but that officers were entitled to qualified immunity).

At the time of the events at issue, as today, there was no "clearly established" law prohibiting state law-enforcement officers, when investigating a crime over which they have jurisdiction, from executing an otherwise valid search warrant directed at tribal documents on tribal property. The court of appeals held that the officers' conduct violated the Fourth Amendment, see Pet. App. 42a, but it is by no means clear that a sovereign Indian Tribe is among "the people" protected by the Fourth Amendment. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-277 (1990); cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (a State is not a

"person" for purposes of the Due Process Clause). Furthermore, the United States is unaware of any appellate authority prior to the decision under review holding conduct such as that at issue here unlawful, under either the Fourth Amendment or under principles of tribal sovereignty.[15] The court of appeals, in concluding that respondents' right to be free from such a search was "clearly established," relied on cases in which state officers were held to have executed illegal searches on a reservation. See Pet. App. 5a-6a. In those cases, however, the state officers were pursuing crimes over which the State did not have jurisdiction. See *United States* v. *Baker*, 894 F.2d 1144, 1146 (10th Cir. 1990); *Sycuan Band of Mission Indians* v. *Roache*, 788 F. Supp. 1498, 1508 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994). Those decisions did not clearly establish a Tribe's immunity from seizures of tribal documents relevant to crimes over which the State *has* authority.

The court of appeals also relied (Pet. App. 4a) on its earlier decision in *United States* v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993). That case, however, did not involve a question of *state* search and seizure authority. In *James*, the court of appeals upheld the federal district court's quashing of a subpoena *duces tecum* directed to a tribal government official during a federal rape prosecution. The defendant in that case had requested confidential information concerning the victim's mental health, and the court of appeals ruled that the Tribe had immunity from that subpoena. *James* involved a subpoena for records sought by an individual defendant, and did *not* hold that the Tribe would be immune from document requests by government law-enforcement agencies. *James* therefore did not clearly establish a tribal immunity to resist searches and seizures by state officials for property held by the Tribe itself. Furthermore, the reasoning in *James* was seriously flawed.

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[15] The court of appeals held, following circuit precedent, that the right to tribal self-government is not an interest that gives rise to a suit under 42 U.S.C. 1983. See Pet. App. 42a.

An official of an Indian Tribe, a sovereign that is subordinate to and dependent upon the United States, has no authority to disregard a subpoena issued by a court of the superior sovereign. See note 10, *supra*. A Ninth Circuit decision that is, in fact, flawed on the issue it addressed can hardly be said to establish clearly the law in this Court on a distinct question.[16]

In sum, in view of the state of the law at the time, reasonable state law-enforcement officers, who were investigating off-reservation state crimes within their jurisdiction and who were acting pursuant to a facially valid warrant, would not have understood that they could not search for and seize employment records from a tribal casino on an Indian reservation. Accordingly, the individual petitioners would be entitled to qualified immunity, even if, contrary to the United States' submission, this action can be brought under 42 U.S.C. 1983.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that respondents have a right of action under 42 U.S.C. 1983 and that the individual petitioners are not entitled to qualified immunity from a suit for money damages. The judgment of the court of appeals should be affirmed insofar as it holds that state officers do not have authority to seize property of the Tribe or the Corporation pursuant to a warrant issued by a state court.

Respectfully submitted.

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[16] Indeed, even if *James* were not flawed, it would not render the right clearly established for purposes of this Court's review. Cf. *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (vacating Ninth Circuit decision finding clearly established right to not be subjected to media ride-along in light of *Wilson* v. *Layne*, *supra*).

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2002

Supreme Court, U.S.
JAN 22 2003
OFFICE OF THE CLERK

INYO COUNTY, A PUBLIC ENTITY; PHILLIP McDOWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF INYO COUNTY; AND DANIEL LUCAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE COUNTY OF INYO,
Petitioners,
v.
PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION
Respondents.

AMICI CURIÆ BRIEF ON THE MERITS IN SUPPORT OF INYO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

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No. 02-281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2002

INYO COUNTY, A PUBLIC ENTITY; PHILLIP McDOWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF INYO COUNTY; AND DANIEL LUCAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE COUNTY OF INYO,
Petitioners,
v.
PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

AMICI CURIÆ BRIEF IN SUPPORT OF INYO COUNTY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

INTEREST OF AMICI CURIÆ

Amicus Curiæ, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this Brief for filing as the authorized law officer of the county, and on behalf of the California District Attorneys Association and the California State Association of Counties, pursuant to Supreme Court Rule 37, subdivisions 3(a) and 4.[1]

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[1] Los Angeles County Charter, Article VII, section 25 (1995)

There are 107 federally recognized Indian tribes and 95 federal Indian reservations in the state of California, with about 40 more Indian groups seeking to gain federal recognition. In 2000, according to the United States Census Bureau, 627,562 Californians claimed at least partial Indian ancestry.[2]

The District Attorney of Los Angeles County, his fellow 57 other elected district attorneys in this state, as well as

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states: "Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board or Commission."

It is provided in the California general law that: "The district attorney is the general prosecutor, except as otherwise provided by law. [¶] The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses." CALIFORNIA GOVERNMENT CODE, section 26500 (West, 2003).

The California District Attorneys Association (CDAA) is a California prosecutorial organization, counting among its 2400 members all of the 58 elected district attorneys in California. CDAA's Appellate Committee takes a proactive stance on matters of statewide concern to prosecutors.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state.

Copies of the consent letters have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.2(a).

[2] <http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=04000US06.html> (viewed Jan. 17, 2003).

the 58 counties represented by the California State Association of Counties, are very concerned by the Ninth Circuit's decision in this case. There are now 50 Indian casinos on Indian territories within the state of California. These casinos already represent potential serious trouble spots for state law enforcement officers throughout the state. If the law as set forth in this decision is allowed to remain, all persons who use and patronize these casinos will be at risk, because trained law enforcement authorities are in effect persona non grata. Worse yet, sheriffs and district attorneys who venture into Indian enclaves to enforce the law will be subject to debilitating civil lawsuits.

The decision by the Ninth Circuit, if not reversed by this Court, could result in the growing number of tribal casinos in California becoming completely isolated from any state and county law enforcement efforts or processes.

Counties with Indian casinos have an urgent need to protect Indians, as well as neighborhoods adjacent to reservations. An independent study of all 3,165 counties in the United States for the period between 1977 and 1996 established that there has been a rise in crime in counties which have casinos, including Indian casinos. While crime rates had dropped overall since 1991, the study found a divergence between crime rates in casino and non-casino counties. Specifically, three categories of property crimes (burglary, larceny, and auto theft), and three categories of violent crimes (rape, robbery, and aggravated assault), became more prevalent in casino counties about three years after a casino was opened. Grinols, Mustard & Dilley, *Casinos, Crime and Community Costs* (Sept., 2000).[3] The single greatest crime increase occurred in the category of automobile theft. We are all aware of the rapid mobility automobiles provide to criminals.

Even the counties in California without Indian casinos

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[3] <http://www.econ.uiuc.edu/papers/files/grinols-Casinos-Crime-15SEP00.pdf> (viewed Jan. 20, 2003).

have a strong interest in preventing fugitive flight to neighboring counties with tribal casinos. If criminals can conceal themselves, evidence, and proceeds of crimes in Indian territory without any fear of disclosure, this will have a substantial negative effect on the criminal justice system for Indians and non-Indians alike.

The decision by the Ninth Circuit has effectively established the foundation of extra-judicial enclaves within an hour's drive of immense urban areas, including San Francisco, Los Angeles and San Diego. Los Angeles County is within a two-hour driving radius of Indian casinos in Riverside, San Bernardino, and San Diego Counties. There are also Indian groups in Los Angeles County, such as the Gabrielino/Tongva Tribal Council in Covina, seeking federal recognition. It is foreseeable that in the future Indian casinos could be established within twenty-five minutes' driving time from downtown Los Angeles.

All Indian casinos seek to attract non-Indian customers, who are largely unaware that they are entering an enclave isolated from any state and county law enforcement protection.

If property owned by tribal governments is immune from lawful execution of search warrants or subpoenas, the potential impact on law enforcement throughout the state, not just in Indian country, could be substantial. If law enforcement authorities are to enforce state laws in Indian country, they cannot be stripped of the necessary tools for enforcement. To do so would be to render the justice system a hollow illusion in Indian country. Stolen money could be laundered, evidence could be hidden, and fugitives could become immune from lawful process. The vacuum created by the absence of law enforcement creates an environment where predators may flourish.

The resulting problems could not be hermetically sealed off from the neighboring communities even with a perimeter wall and a Brandenburg gate. The potential for very serious problems is not merely speculative. In 1995, Lake County in

California was thrust into turmoil as nearly seventy people fled the Elem Indian Colony when gun battles erupted over disputed casino profits. Nine people were wounded, five Indian houses were torched, and other houses were boarded up to shield against gunfire. Peace was not restored to the one-hundred-member reservation until sheriff's deputies entered the reservation to maintain order. Numerous arrests were made.[4] The Elem Indian Colony is only ninety miles from San Francisco.

The Chairman of the Bishop Paiute Tribal Council, Monty Bengochia, provided evidence supporting Amici's position in his recent testimony before the United States Senate Committee on Indian Affairs.

> Law enforcement services provided by the County on our reservation are inadequate and response time is very slow. State and federal drug enforcement on our reservation is virtually nonexistent. Our single biggest law enforcement problem is unsolved homicides and other unresolved fatalities, numbering at least half a dozen over the last ten to fifteen years.
>
> We feel both county and state law enforcement agencies provide us with a level of services that is inequitable and unfair compared to the level of services provided to non-Indians and off-reservation areas.

Hearing Testimony Before the Senate Committee on Indian

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[4] Kathleen Sullivan, *Pomo Indian truce shaky, as factions return*, SAN FRANCISCO EXAMINER, Oct. 25, 1995, at A-11; *A Year After Violence, Reservation Looks to Heal with Election*, ASSOCIATED PRESS, Nov. 29, 1996, *available in* LEXIS, News Library, US News Combined File.

Affairs, July 11, 2002.[5]

Chairman Bengochia was before Congress demanding greater law enforcement protection, but in federal court in California attempting to deny Inyo County law enforcement agents the tools, such as search warrants and qualified immunity, necessary to complete the tasks. Chairman Bengochia's position is similar to that of other myopic proponents of expanding Indian sovereignty who demand the imagined benefits of sovereignty without considering the consequences which would endanger Indians and non-Indians alike.

"Two centuries of often contradictory federal court decisions have ensured that the definition and boundaries of tribal sovereignty remain in flux." *National Gambling Impact Study Commission Report*, p. 6-1 (1999).[6] We are at a point which calls for a logical interpretation of precedent. As John Locke observed in 1690, every nation's survival and self-governance hinges on its ability to maintain law and order and secure "comfortable, safe and peaceable living among its citizens."[7] The problems Chairman Bengochia describes will only fester and expand to surrounding communities if the Ninth Circuit decision is not reversed.

Indeed, even potential terrorist activity would be immune. Federal authority over state crime has been completely consigned to the states in Public Law 280 states. The protection sought by tribal leaders against unreasonable searches and abuses of process is equally available to all Americans, but requires that Indian tribes, like everyone else,

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[5] Reported at <http://indian.senate.gov/2002hrgs/071102hrg/bengochia.PDF> (viewed Jan. 20, 2003).

[6] Congress created the National Gambling Impact Study Commission with Public Law 104-169, 110 Stat. 1482 (1996).

[7] *John Locke,* Second Treatise of Government *58 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) 1690.*

submit to the law of the land.

SUMMARY OF ARGUMENT

Historical Background

In 1607, Chief Powhatan of the Algonquin tribe traded food to the Captain of the first permanent British settlements in Virginia in exchange for whiskey. This archetypical drama replays itself to this day. Just as this continent's earliest settlers used objects of "vice" to entice the Indian communities into docility,[8] so the Indian Gaming Regulatory Act, 25 U.S.C. § § 2701-2721, compels the states to authorize via compacts contemporary tribes' operation of gambling casinos.

The justifications for doing so are largely sociological in nature: The status of Indian peoples has only relatively recently begun to square with this nation's constitutional ideals of justice and fair play; and the injustices of past generations are well-settled in the nation's collective psyche.

The legal basis for Congress's allowing Indian tribes to operate casinos, which would otherwise be prohibited by the states, is the concept of the tribes' sovereignty, vis-à-vis the states' governments. The historical basis for tribal sovereignty is one of sequestration and neglect: This continent's earliest European settlers sought land, but had little tolerance for the indigenous inhabitants. The reservation system, upon which the federal Bureau of Indian Affairs' present "trustee lands" authority is based, was established primarily to separate land from Indians; and secondarily to isolate Indians from the burgeoning colonial settlements.

Whether well- or ill-intentioned, the reservation or "trustee lands" policy perpetuates an inherently segregationist status quo. Indians living on those lands are explicitly denied

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[8] Joseph Westermeyer, *Alcoholism among new world peoples – A critique of history methods, and findings*, 5 AMERICAN JOURNAL ON ADDICTIONS 2, at 110-123 (1996).

the protection of the laws of the states in which the Indians reside, on the basis of tribal sovereign immunity from the states' laws. Compare, e.g., the properly discredited "separate but equal" doctrine maintained in *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). Strictly applied, the concept of Indians' tribal sovereignty requires far less than that holding, in that tribal sovereignty (and the self-governance attendant thereto, contemplated but never obligatory) requires merely separation, not equality. Such application was intellectually sustainable, at the latest, prior to 1924, when Congress passed the Citizenship Act,[9] which unilaterally, albeit belatedly, conferred United States citizenship status upon Indians, regardless of whether they lived on- or off-reservation.

Indian "Sovereignty" Today

Sovereignty has been defined as:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.
>
> The power to do everything in a state without accountability, to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

BLACK'S LAW DICTIONARY, 1251 (5th ed. 1979).

Whatever definition the word "sovereignty" has in its routine context (if there can be such a thing; this nation's relationships with sovereign nations cannot be unvarying), it is presently well-settled that Indian tribes, their real property, held in trust by the federal Bureau of Indian Affairs, and their governing bodies, to the extent they exist, are subject to the plenary powers of Congress, and to the Constitution. In many instances, such as Public Law 280[10] and the Kansas Act,[11] Congress has established and delegated authority and power to specific states; power and authority which, to a degree, must impinge upon or limit the tribes' selfhood as "sovereign." To what degree is the question to be answered.

When Congress passed Public Law 280 in 1953, it consigned authority to enforce criminal law in Indian country to six states including California. As one of the fifty states, California has an inherent right to prosecute crimes in California outside Indian country. The Ninth Circuit in its decision on this case seemingly recognized this legislation, but then decided that the six states are to be denied the tools necessary to enforce the law. In doing so, it disregarded both common sense and the opinion of this Court in *Nevada v. Hicks,* 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

Because the state has the authority and duty to investigate and prosecute crimes in Indian country, the authority for the preliminary procedures in support of that process is necessarily mandated. To hold otherwise would be to render the duty to prosecute crimes in Indian country an empty shell. Reservations would become enclaves. These

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[9] Presently codified at 8 U.S.C. § 1401, hereinafter "Citizenship Act."

[10] 18 U.S.C. § 1162, hereinafter "Public Law 280."

[11] 18 U.S.C. § 3243, hereinafter "the Kansas Act."

enclaves would permit evidence of crimes, both on and off the reservation, to be concealed. Perpetuating the reasoning of this Ninth Circuit decision will expose the Indian residents of California reservations to increased danger from violent crime as the chilling effect upon law enforcement grows. If law enforcement officers are loathe to execute search warrants on tribal property due to fear of liability, they will also be reluctant to investigate crimes and arrest those reasonably suspected of committing crimes. The theoretical power to prosecute criminals who commit robbery at a casino is meaningless without the power to subpoena the victim clerk or issue a subpoena duces tecum for relevant records in an embezzlement case.

Ironically, the Ninth Circuit's application of its concept of sovereignty leaves the supposed beneficiaries of this doctrine, the Indians, most vulnerable to violence and exploitation. If an Indian man beats his wife in a casino parking lot monitored by video cameras, and she is rendered comatose by the beating, the only evidence available to prosecute the man, the videotape, would be denied to the responsible authorities. If an Indian is falsely accused of the same type of offense, the only exculpatory evidence could also be withheld by the tribe claiming sovereignty.

The Ninth Circuit disregarded Public Law 280, and attempted to create a Maginot line on the reservation border as a barrier to law enforcement. This issue of an imaginary border was addressed by the North Dakota Supreme Court in *Fournier v. Roed*, 161 N.W. 2d 458 (N.D. 1968). In that case, the court ruled that a sheriff may enter a reservation and, without a warrant, arrest an Indian for a felony committed off the reservation. The court found that the sheriff's actions did not interfere with tribal self-government. *Id.* at 467.

> What is involved is whether the state courts will be able to be effective in performing their functions or whether they will become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended.

Id. at 465.

ARGUMENT

I

PUBLIC LAW 280 CONFERS AUTHORITY UPON CALIFORNIA TO INVESTIGATE AND PROSECUTE FELONIES OCCURRING IN INDIAN COUNTRY OR INVOLVING INDIAN DEFENDANTS OR VICTIMS

A.
Sovereignty Of Indian Tribes Is Subject To The Powers Of Congress And May Be Limited By Congress

The history of Indian sovereignty as discussed by the United States Supreme Court begins in the 1830's with the Cherokee decisions. Indian tribes were then described as distinct dependent nations within whose boundaries state law has no application. The relationship with the Federal Government was described in a trust capacity, as a ward to a guardian.[12] The sovereignty of Indian tribes is subject to the broad powers of Congress to regulate.[13] This Court had

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[12] *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831); *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832).

[13] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1676, 56 L. Ed. 2d, 106, 114 (1978) [ruling that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess."]; *Morton v. Mancari*, 417 U.S. 535, 551-552, 94 S. Ct. 2474, 2482-83, 41 L. Ed. 2d 290, 300-301 (1974) [basing

recognized that this power is plenary and that Congress has exclusive authority over Indians and tribal property.[14] This authority can be delegated to the states, as in 1953 when Congress passed Public Law 280. Crimes and Criminal Procedure, 18 U.S.C. § 1162; *Robinson v. Wolff*, 349 F. Supp. 514 (D.C. Neb. 1972), *aff'd*, 468 F.2d 438 (8th Cir. Neb. 1972). This act granted six states, including California, criminal jurisdiction over persons who commit crimes or who are victims of crimes in Indian country. Title 18 U.S.C. § 1162, provides in pertinent part:

> State jurisdiction over offenses committed by or against Indians in the Indian country
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over

plenary power on treaty history with Indians and their guardianship status with the United States]; *Winton v. Amos*, 255 U.S. 373, 391, 41 S. Ct. 342, 3498, 65 L. Ed. 684, 694 (1921) [asserting that Congress has plenary power to legislate issues of tribal property because of the dependent relationship the Indians have with the United States government]; see also *Talton v. Mayes*, 163 U.S. 376, 384, 16 S. Ct. 986, 989, 41 L. Ed. 196, 199 (1896) [asserting that tribal sovereignty is subject to the "supreme legislative authority of the United States."]. The sovereignty retained by a tribe "exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303, 313 (1978).

[14] See Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, at 317, 318 (Oren R. Lyons et al. eds., 1991) [defining the doctrine as that which allows Congress "to unilaterally intervene and legislate over a wide range of Indian affairs, including the territory of Indian Nations."].

> offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory *to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory*: [Alaska, *California*, Minnesota, Nebraska, Oregon, and Wisconsin.]

18 U.S.C. § 1162 (a), emphasis added.

When Congress enacted Public Law 280, nothing more was required from the six named states to assume jurisdiction over crimes committed in Indian country. 18 U.S.C. § 1162; see *People v. Miranda*, 106 Cal. App. 3d 504, 506, 165 Cal. Rptr. 154, 155 (1980) [no state legislation necessary to assume jurisdiction under Public Law 280 because states already had either concurrent or residual jurisdiction over offenses committed on Indian lands within their territory]; cf. *Anderson v. Gladden*, 293 F.2d 463, 467-468 (9th Cir. 1961), *cert. denied*, 368 U.S. 949, 82 S. Ct. 390, 7 L. Ed. 344 (1961) [no affirmative action required by Oregon to assume jurisdiction in Indian country even where there was a prior treaty between the tribe and the Federal Government providing for federal prosecution].

Prior to 1953, Congress had enacted two statutes which established federal authority to prosecute crimes in Indian country. These statutes are known as the General Crimes Act and the Major Crimes Act.[15] The Major Crimes

[15] The General Crimes Act (18 U.S.C. § 1152), enacted in 1817, generally provided for federal prosecution of interracial crimes in Indian country, but precluded federal prosecution where an Indian was already being prosecuted under tribal law.

The Major Crimes Act (18 U.S.C. § 1153) was enacted in 1885 and provided for federal concurrent jurisdiction over

Act delineates state and federal jurisdiction in states other than the six designated in Public Law 280 (which includes California). Public Law 280 explicitly withdrew federal law enforcement for criminal law in Indian country in those six states, relegating to those states exclusive criminal jurisdiction.

At the same time, Congress consigned the authority to prosecute crimes in Indian country to the six states pursuant to part (c) of 18 U.S.C. § 1162:

> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

This Court recently addressed this issue in *Nevada v. Hicks*, 533 U.S. 353 (2001). In that case, the tribal court attempted to exercise jurisdiction through a federal tort action against state officials who served a search warrant on tribal land. In denying the tribal court jurisdiction, the Court discussed the sovereignty issue.

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Peters 515, 561 (1832)," *White Mountain*

Indians for enumerated crimes. This statutory structure allowed for either tribal prosecution or federal prosecution, or both. *United States v. Wheeler*, 435 U.S. 313, 325 (1978).

> *Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980). "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962).

Nevada v. Hicks, 533 U.S. at 361-362, fn. omitted.

B.

California Has Jurisdiction And The Duty To Prosecute Welfare Fraud Committed On Or Outside Indian Land Within The State Of California

Since the passage of Public Law 280, there has been some litigation as to what acts fall under state jurisdiction and what acts are subject to regulation by tribal authorities. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), this Court ruled that an attempt by Riverside County to enforce California Penal Code provisions regulating poker and bingo inside reservation boundaries was an unauthorized extension of state civil regulatory power not granted under Public Law 280. In so holding, the Court declared that when a state tries to enforce one of its laws in Indian country, it must first determine if the law is, by nature, civil/regulatory or criminal/prohibitory. *Id.* at 208.

In *Cabazon*, the law was found to be merely civil/regulatory and therefore unenforceable by state authorities on the reservation. In determining whether the specific law was civil/regulatory or criminal/prohibitory, the Court sought to determine if the specific conduct was a subset of other permitted conduct or whether it was prohibited throughout the

state. In *Cabazon*, the Court determined that since bingo is an authorized activity by charitable organizations, and gambling is permitted at horse race tracks and through the state lottery, these specific violations were civil/regulatory rather than criminal/prohibitory. *Id.* at 210-211.

In this case involving the Bishop Paiute Tribe, the specific state law sought to be enforced is California Welfare & Institutions Code, section 10980, subdivision (c).[16] This section provides for potential state prison sentences where fraud and deceit are employed in the unlawful collecting of

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[16] California Welfare & Institutions Code § 10980, subdivision (c), provides:

> Whenever any person has, by means of false statement or representation or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:
>
> (1) If the total amount of the aid obtained or retained is four hundred dollars ($ 400) or less, by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($ 500), or by both imprisonment and fine.
>
> (2) If the total amount of the aid obtained or retained is more than four hundred dollars ($ 400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($ 5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars ($ 1,000), or by both imprisonment and fine.

welfare. Misconduct involving forgery or fraud "inherently involves dishonesty and readiness to lie, and thus involves moral turpitude." *People v. Flanagan*, 185 Cal. App. 3d 764, 771, 230 Cal. Rptr. 64, 68 (1986). In none of the cases interpreting *Cabazon* has a crime involving moral turpitude been defined as merely regulatory and beyond the states' purview of enforcement. When the crime requires fraud or deceit, as does welfare fraud, there is no doubt it is crimnal/prohibitory and subject to state jurisdiction.

II

THE AUTHORITY TO PROSECUTE INCLUDES THE AUTHORITY TO CONDUCT INVESTIGATIONS AND PREPARE FOR PROSECUTION

The authority to enforce the criminal laws in Indian country required in Public Law 280 must necessarily include the authority to investigate and utilize a search warrant to effectively prosecute a case. As discussed by the district court in *Sycuan Band of Mission Indians v. County of San Diego, et al.*, 788 F. Supp. 1498 (S.D. Cal. 1992), *aff'd*, 38 F.3d 402 (9th Cir. Cal 1994), this authority was affirmed by comparing the alternative scenario, in which there was no authority to issue a search warrant. In *Sycuan*, the state sought to prosecute the possession of gaming machines. Since this was determined to be a civil/regulatory class of offenses and ***not*** subject to state prosecution,[17] logically there was no authority to issue a search warrant where the state lacked the authority to prosecute any charges based on evidence resulting from that warrant.

The district court stated, "[a] state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation." *Sycuan*, 788 F.

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[17] Subject only to federal regulation.

Supp. at 1507. By necessary inference, the authority to prosecute crimes in Indian country would be meaningless if the traditional tools for prosecutors were left at the gates to Indian country.

As an example, a robbery committed against an Indian casino employee inside the casino cannot be prosecuted if the prosecutor is unable to subpoena the victim casino employee. Likewise, embezzlement committed against a tribe's casino cannot be prosecuted if a prosecutor cannot issue a subpoena duces tecum for casino records for use in the prosecution of an embezzler. If exculpatory or inculpatory evidence is located inside a casino, which is owned by the tribe, in a case where the state has the authority to prosecute, the casino and its owner/employees are subject to the same laws as the rest of the state. But, they also enjoy the same constitutional protections. A murder suspect who flees to an Indian casino should not expect sanctuary, or that evidence of his crime will find a safe repository; he should expect a lawful arrest. To permit casinos to become enclaves immune from the execution of lawful search warrants will result in condemning Indian casinos to inordinate pressure from organized crime to conceal evidence and proceeds from criminal activities.

The district court in the *Sycuan* case went further and added overly expansive dicta suggesting that a sheriff exceeds his jurisdiction by serving a warrant on tribal land inside his county. *Sycuan Band of Mission Indians v. County of San Diego, et al.*, 788 F. Supp. at 1508. The district court was incorrect in that assessment. California magistrates have the authority to issue search warrants to peace officers in their counties to search anywhere in the state. *People v. Fleming*, 29 Cal. 3d 698, 703-707, 631 P.2d 38, 41-45, 175 Cal. Rptr. 604, 607-611 (1981). A sheriff enforcing criminal/prohibitory laws pursuant to state law is executing authority granted to the states by Public Law 280. Only if he is attempting to enforce civil/regulatory laws, would he be acting outside that authority. To hold otherwise would result in deprivation of all people in

Indian country in the six Public Law 280 states of any protection under the states' criminal justice system.

The authority of the state to execute search warrants in Indian country was clearly explained in the majority opinion in *Nevada v. Hicks*, 533 U.S. 353. The Court stated that the process of state courts may extend to an Indian reservation where there is subject-matter or controversy within their cognizance. The Court explained:

> The Court's references to "process" [citation], and the Court's concern [citation] over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us. ("Process" is defined as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property," Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id*. at 1085.) It is noteworthy that [*United States v.*] *Kagama* [118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886)] recognized the right of state *laws* to "operate . . . upon [non-Indians] found" within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the *process* of state courts. This makes perfect sense, since, as we explained in the context of federal enclaves, *the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice."* [Citation.]

Nevada v. Hicks, 533 U.S. at 363-364, last emphasis added.

This Court applies the same constitutional protections all Americans enjoy to those living in Indian country in California. The Court forcefully stated this position:

> We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control. . . . Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights.

Nevada v. Hicks, 533 U.S. at 373.

To hold otherwise would serve as a clarion call to all criminals, announcing a judicial vacuum and inviting potential anarchy, since the state would lose the necessary tools to prosecute serious felonies and the Federal Government now lacks the authority to do so, having consigned it to the states.

While addressing the issue of qualified immunity as to the officers serving the search warrant, the Ninth Circuit included a dismissive footnote suggesting that the authority of the states to execute search warrants had already been clearly decided against local law enforcement. In footnote 5 of its opinion, it cited two cases, neither of which involve Public Law 280 states.[18] Indeed, one of those cases clearly distinguishes

[18] Footnote 5 states:

> The Tenth Circuit has also addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), state authorities executed a search warrant on a tribal reservation. The Tenth Circuit concluded that the search warrant was invalid, and therefore the evidence should have been suppressed, because the state had no jurisdiction over the reservation to enforce its laws – including the execution of a search warrant – unless Congress consented to the state's jurisdiction. *Id.* at 1147. See also *Ross v. Neff*, 905 F.2d 1349, 1354-55 (10th Cir. 1990) (holding that the arrest of an Indian on Indian land was illegal because the state had no jurisdiction over the reservation to enforce its laws – including the execution of a search warrant – unless Congress consented to the state's jurisdiction).

Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 911, fn. 5 (9th Cir. Cal. 2002).

itself from any case arising in California.

> Congress has ***granted general criminal jurisdiction to some states over Indian country within their borders***, see, e.g., 18 U.S.C. §§ 1162 (various states), 3243 (Kansas), but no such provision has been made for Oklahoma.

Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. Okla. 1990), emphasis added.

As shown in *Ross*, Oklahoma is a state which has not been granted criminal jurisdiction under the Major Crimes Act. Oklahoma's situation is distinct from California's, in which there is no federal jurisdiction to prosecute crimes, because the duty to prosecute crimes was expressly delegated to California and five other states.

Qualified immunity serves to shield government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). When ruling on qualified immunity, a court considers two questions: first, "[t]aken in the light most favorable to the party asserting the

injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001). Second, a court "is to ask whether the right was clearly established." *Id.* The plaintiff bears the burden of showing that the right was "clearly established." *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). Surveying the legal landscape at the time of the alleged act, a court must ask, were "[t]he contours of the right...sufficiently clear that a reasonable officer would understand that what he [was]doing violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987).

A decision in the Tenth Circuit in 1996 could have indicated to the Inyo authorities the validity of a search warrant. In *Kaul v. Stephan*, 83 F.3d 1208 (10th Cir. 1996), the Kansas attorney general authorized a search warrant for a store on an Indian reservation. The storeowner argued that the state of Kansas lacked jurisdiction due to Indian sovereignty.

The *Kaul* court recognized that,

> in general, "federal protection of tribal self-government precludes either criminal or civil jurisdiction over Indians or their property absent the consent of Congress." Felix S. Cohen, Handbook of Federal Indian Law 349 (1982 ed.). However, "at times Congress has retained Indian country status but has delegated partial jurisdiction over areas of Indian country or over specific legal subjects." Id. at p. 361.

Kaul v. Stephan, 83 F.3d at 1216. Congress had delegated jurisdiction to Kansas in the Kansas Act, which delegated authority to Kansas over offenses committed by or against Indians on Indian reservations to the same extent as its courts have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state. "Because Stephan was acting to enforce a criminal law under a federal grant of criminal jurisdiction, we believe that Stephan possessed jurisdiction to execute the warrants at Kaul's store." (*Kaul v. Stephan*, 83 F.3d at 1218.)

This congressional delegation of authority is functionally identical to Public Law 280 which delegated the same authority to California.

The Ninth Circuit acknowledged the duty of the county district attorney to prosecute, but presumed to dictate to law enforcement alternatives to a search warrant in prosecuting welfare fraud. These included serving a search warrant on the offenders in the hope that each offender kept accurate pay stubs, or seeking consensual disclosure from the tribes of the offenders.

These suggestions encroach on the separation of powers doctrine and demonstrate a woeful lack of experience in the gathering of admissible evidence necessary to prove a criminal case beyond a reasonable doubt. The pay stubs would need to be authenticated with business records and testimony of a custodian of records obtained from the tribe. Further, the authority cited for this approach, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) is a civil case wherein the tribe was being sued civilly for payment of taxes. Furthermore, once again, the Ninth Circuit attempted to use a case from a state which is not required to prosecute major felonies involving tribal lands. It is not in any way analogous to a situation in which a state is required to prosecute crimes but is deprived of a necessary tool to accomplish this goal.

III

IMMEDIATE PROBLEMS AND PROBLEMATIC ATTEMPTS AT COMPROMISE IN THE WAKE OF THE NINTH CIRCUIT'S DECISION

Charles Dudley Warner, who quipped that politics makes strange bedfellows, would take note. Since the Ninth

Circuit's decision – but prior to this Court's grant of certiorari – the Office of the Attorney General of California, with and on behalf of the state's concerned sheriff's departments, has tried to address the vacuum created by that court's decision. The challenge for law enforcement is to deal with the competing forces of Congress (as evident in Public Law 280) and the Ninth Circuit. Also of obvious concern is the protection of deputies and prosecutors, to whatever degree the Ninth Circuit's decision allows, from the threat of personal liability and potential financial ruin.

In the wake of the Ninth Circuit's decision, earnest but desperate state executive agencies' attempts at implementing the decision have been misguided and constitutionally strained. For instance, on August 29, 2002, the California Attorney General's Office presented a four-day "Tribal and State Justice Summit," at which it was generally agreed that "[t]he source of many of the problems [of tribal and state justice] is Public Law 280." Agnes Diggs, *Tribes, police seek solutions*, NORTH COUNTY TIMES, Nov. 3, 2002. This premise is patently false. Public Law 280 is the solution to the problem of tribal and state justice. Public Law 280 clearly makes California responsible for law enforcement in Indian country.

San Diego County Sheriff's Lieutenant Maury Freitas, who participated as a panel member in the "Tribal and State Justice Summit," affirmed that "[w]ith the casinos came an increased number of customers and the element that preys on customers." Agnes Diggs, *Tribes, police seek solutions*, NORTH COUNTY TIMES, Nov. 3, 2002.[19] San Diego County contains more Indian reservations than any other county in the Union. Rather than abandon Indian country law enforcement altogether – a slippery and short slope from the Ninth Circuit's conclusion – the San Diego Sheriff's Department has

[19] See Grinols, Mustard & Dilley, *Casinos, Crime and Community Costs*, (Sept., 2000). Also see discussion under "Interest of Amici Curiæ," beginning on p. 1 of this Brief.

considered the unsatisfactory solution of extending academy training and conferring peace officer status to selected members of Indian tribes' security teams.

Similarly, California's State Legislature's attempts to accommodate the Ninth Circuit have been frustrated. In the beginning of 2002, a dialogue between tribal authorities and the California State Legislature, exploring the possibility of introducing legislation that would grant P.O.S.T.[20] certification and peace officer status upon Indian security personnel, fell apart. The proposed legislation, SB 911, died in committee. The reason, according to Marla Marshall, Special Assistant to San Diego Sheriff Bill Kolender, was the unreasonable demands of the Indian tribes. " 'They wanted to have law enforcement authority, but not be subject to the penal code that every other law enforcement officer in the state is subject to.' " James P. Sweeney, *California tribes' push for full police powers is shelved*, COPLEY NEWS SERVICE, Jan. 13, 2002.[21]

The reality of the lack of proper law enforcement and abuse of authority in Indian country without any legal restraints or consequences for excesses is exemplified by *Linneen v. Gila River Indian Com.*, 276 F.3d 489 (9th Cir. 2002). In 1996, Ross and Kim Linneen were walking their dogs on the Gila River Indian Reservation in Arizona when they were detained by a Ranger from the tribe. The detainees provided the following uncontested account, when Indian Ranger Andrews was dispatched to investigate.

> When Andrews arrived, he jumped out of his truck, drew his gun, and crouched behind the truck door. He ordered Ross to turn around

[20] "Peace Officer Standards Training." Statutory provisions for peace officers, as defined by CALIFORNIA PENAL CODE § 830.1 (West 2003) and CALIFORNIA LABOR CODE § 95 (West 2003) include statewide authority to make arrests, and partial exemption from civil liability.

[21] Available in *LEXIS, News Library, News Group File.*

> and put his arms on his head. He searched the Linneens and their car. He kept the Linneens in custody for three hours, during which time he told them that they were guilty of various offenses that would result in jail time; told them that their possessions would be impounded and their dogs destroyed; held a gun to their heads; complained about injustices suffered by Native Americans at the hands of Caucasians; and lectured them on religious doctrine. Andrews finally released the Linneens after citing them for criminal trespass. The charges against the Linneens were later dismissed.

Id. at 491.

The Linneens sued the Ranger and the Tribe in federal court, but the case was dismissed due to sovereign immunity enjoyed by the tribe and the Ranger. This result was upheld by the Ninth Circuit.

CONCLUSION

The clear intent of Congress is to combat lawlessness in Indian country. Since California is required to assume the responsibility of protecting all persons against crimes in Indian country as it does for the rest of the state, the effective tools of law enforcement cannot be discarded. The Ninth Circuit Court's decision to the contrary should be reversed.

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What Amici Curiæ respectfully request is simply that for which Chief Joseph of the Nez Perce tribe asked of President Rutherford B. Hayes, in 1879:

> Whenever the white man treats the Indian as they treat each other then we shall have no more wars. We shall be all alike -- brothers of one father and mother, with one sky above us and one country around us and one government for all.[22]

Respectfully submitted,

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[22] Chief Joseph, *That All People May be One People, Send Rain to Wash the Face of the Earth* (Mountain Meadow Press 1995) 1879.

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In The

Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF
Petitioners

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL. IN SUPPORT OF THE PETITIONERS

The National Sheriffs' Association, et al. respectfully submit this *amici curiae* brief in support of Petitioner, Dan Lucas, individually and as elected Sheriff of Inyo County, California. Pursuant to Supreme Court Rule 37.2.(a), this *amici curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*[2]

The National Sheriffs' Association is a § 501(c)(4) non-profit association, formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriff throughout the United States. The NSA has over 21,000 members, and is the advocate for 3,088 sheriffs throughout the United States.

The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the nation. The National Sheriffs' Association participates in judicial processes where the vital interests of law enforcement and its members are affected.

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with the Supreme Court Rule 37.6, NSA represents that no counsel for any party authored this brief in whole or in part, and the following made monetary contribution to assist in the costs of counsel employed to prepare and submit this brief: Western State Sheriffs' Association.

[2] For a list of all of the sheriffs' organizations who join as *amici curiae*, please see Appendix A.

The office of sheriff is one of the oldest publicly elected offices known in the common law system of jurisprudence; and the modern office of sheriff is a peacekeeper and serves and executes official court documents. Throughout the nation, the office of sheriff has retained the responsibility of being the primary law enforcement organization which secures the order and safety of the local community.

In the normal course of his or her civil and criminal duties and jurisdiction, a sheriff or deputy is required, frequently on a daily basis, to serve and execute writs, subpoenas, summonses, search warrants and other facially valid court papers. This Court will not be surprised to learn that, in the course of a year, the Nation's sheriffs and their deputies serve and execute millions of facially valid court papers. The petitioner, Sheriff Lucas, individually and in his official capacity as the elected Sheriff of Inyo County, California, was – through his deputies – carrying out the statutory and constitutional duties of the office of sheriff by assisting in the service and execution of a facially valid search warrant, and is therefore entitled to the defense of qualified immunity under 42 USC § 1983.

The Western States Sheriffs's Association[3] is interested in this *Amici Curiae* brief because of the prevalence of Indian Lands in their jurisdictions. The sheriffs, who are members of more than 30 individual state sheriffs' associations found in Appendix A, are also intensely interested in the important issue of the service and execution of facially valid search warrants.

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[3] The Western States Sheriffs's Association includes Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wyoming.

The *Amici Curiae* believe they can be of material assistance to the Court in this case regarding the sheriff and his deputies' qualified immunity with regard to the service of a facially valid search warrant secured by another. The failure of the Ninth Circuit to sustain the petitioner's defense of qualified immunity, under the facts of this case, could have far-reaching adverse effects on the 3,088 sheriffs in our Nation, if this Court does not reverse.

SUMMARY OF ARGUMENT

This Court should reverse the Ninth Circuit first to conclusively establish that its ruling in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) controls the facts of this case. This Court has never ruled on the propriety of the service of a facially valid search warrant on Indian Tribal Governments, their casinos or other offices and for-profit businesses.

Equally as important, this Court should reverse the clearly erroneous opinion of the Ninth Circuit regarding the doctrine of qualified immunity. In this case, Sheriff Lucas and his deputies should have been afforded qualified immunity, particularly since they were assisting with a facially valid search warrant which had previously been obtained and actually served by the Inyo County D.A.'s office.

It is the failure of the Ninth Circuit to recognize the doctrine of qualified immunity, when the search warrant was facially valid, which is the focal point of this *Amici Curiae* brief. This is particularly true in light of *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), where this Court recently reversed another Ninth Circuit holding which failed to appreciate the proper contours of qualified immunity.

ARGUMENT

THE PETITIONER SHERIFF AND HIS DEPUTIES WERE ENTITLED TO QUALIFIED IMMUNITY REGARDING A FACIALLY VALID SEARCH WARRANT

Three Paiute-Shoshone Indians, working as employees at the for-profit enterprise at the Paiute Palace Casino("Casino"), in Inyo County, California, failed to report income received as wages from the Casino and, as such, violated California state law because they were concurrently receiving wages and public welfare assistance from the state.

Investigator Leslie Nixon, of the Inyo County District Attorney's Office, requested the employees' payroll documents from the Casino, but was denied. Therefore, she obtained a search warrant from the California Superior Court which authorized a search for the three employees' records at the Casino. When investigator Nixon attempted to execute the search warrant, the Casino rebuffed her by claiming sovereign immunity and denying her access to an out-building where the employee records were actually located.

Investigator Nixon then called the office of Sheriff Lucas; and deputies were dispatched to assist and to maintain peace and good order at the Casino. The deputies inspected the search warrant, concluded it was facially valid, and secured bolt cutters, which were then used to cut the padlock, whereupon the appropriate records were seized by Nixon.

The Paiute-Shoshone lost a declaratory judgment/ injunctive relief case in the U.S. District Court, but that decision was appealed and reversed by the Ninth Circuit, which also countenanced the right of the tribe to seek a money

judgment against Sheriff Lucas and his deputies under the federal civil rights statute, 42 U.S.C. § 1983.

A. Background of Qualified Immunity

The doctrine of qualified immunity provides a full defense if a defendant's conduct did "... not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). (Emphasis added.) Officials are not liable for bad guesses in gray areas; they are only liable for transgressing bright lines.

The district court below was correct when it concluded that "... the sheriff has qualified immunity because his department merely executed a facially valid search warrant signed by the magistrate." *Petition for Writ of Certiorari*, Appendix A, p. 58a.

In *Saucier v. Katz*, *supra*, this Court again visited the important doctrine of qualified immunity and, in reversing the same Ninth Circuit whose ruling brings us here, this Court clearly enunciated a two-step qualified immunity test:

> 1. Did the official violate a constitutional right (viewing the facts in a light most favorable to the plaintiff)?
>
> 2. Assuming the trial court answers question one affirmatively,[4] was the constitutional right clearly established in the specific context of the case that a

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[4] As the *Saucier* Court pointed out, if a trial court cannot establish a constitutional violation, then there is no further inquiry required and the official prevails. *Saucier*, *supra* at 201, 121 S. Ct. at 2156, 150 L. Ed. 2d at 281.

reasonable official would understand that what he or she is doing violates that right[5]

This Court has also written that the privilege ". . . is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985). (Emphasis in original.) As a result, " . . . we repeatedly have stressed the importance of resolving immunity at the earliest possible stage in litigation." *Hunter v. Bryant*, *supra* at 227, 112 S. Ct. at 536, 116 L. Ed. 2d at 595.

B. The Ninth Circuit Erroneously Concluded That Respondents Had A Right To Be Free From A Facially Valid Search Warrant

Incorrectly citing *United States v. James* , 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838, 114 S. Ct. 119, 126 L. Ed. 2d 84 (1993) as the basis for finding that the respondents' constitutional rights were violated by petitioners, the Ninth Circuit ignored the controlling law of *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). If the Ninth Circuit had correctly followed the *Nevada* decision, it would not have declared a violation of any constitutional rights by Sheriff Lucas or his deputies; and the district court's ruling would have been summarily affirmed.

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[5] Importantly, where a state official is accused of a violation of a citizen's "rights," this Court requires that a plaintiff "particularize" the right so that "The contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed.2d 523, 531 (1987).

The Ninth Circuit's ruling to the contrary should be corrected by this Court.

C. Respondents Had No Clearly Established Fourth Amendment Rights, Cognizable By A Reasonable Sheriff, To Avoid A Facially Valid Search Warrant

Assuming, *arguendo*, that respondents had a constitutional right to be free from the search warrant, was the second test satisfied, *i.e.*, was that right "clearly established," such that a reasonable sheriff, or his deputies, would have understood that the search warrant violated respondents' Fourth Amendment rights particularized to the facts of this case? The answer is "no" because in *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), this Court established that there was no constitutional right implicated by the mistaken arrest of a citizen, so long as the officer possessed a facially valid arrest warrant.

This Court found that a sheriff, executing such an arrest warrant, was not " . . . required by the Constitution to investigate independently every claim of innocence whether the claim is based on mistaken identity or a defense such as lack of requisite interest." *Id.* at 145-46, 99 S. Ct. at 2695, 61 L. Ed. 2d at 442.

Respondents citation to *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) and *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) are not to the contrary. Indeed,*Malley* proclaims that qualified immunity protects "... all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341, 106 S. Ct. at 1096, 89 L. Ed. 2d at 278. *Malley* did not deny qualified immunity to a police officer who arrested with a warrant; it simply remanded for a determination whether the officer acted with

objective reasonableness. The *Leon* decision supports petitioners because the Court found that a police officer's reliance, on a magistrate's determination of probable cause for a search warrant, was objectively reasonable.

1. The Ninth Circuit Erroneously Concluded That Fourth Amendment Law Under the Facts Of This Case Clearly Prohibited The Sheriff And His Deputies From Acting Pursuant To A Facially Valid Search Warrant

As petitioners correctly argue, *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) controls this case and, inexplicably, was ignored by the Ninth Circuit. That simple circumstance requires reversal.

It is apparent that the Ninth Circuit was wrong when it concluded that a reasonable sheriff would certainly have realized that respondents' Fourth Amendment rights were clearly established to prevent the use of a facially valid search warrant on tribal property even if it be for off-reservation criminal activity.

If one is to argue that Sheriff Lucas cannot access *Hicks* itself for his qualified immunity,[6] he should surely yield to the several cases cited by *Hicks* in support of this Court's eventual ruling. Thus, the case of *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151, 100 S. Ct. 2069, 2080, 65 L. Ed. 2d 10, 27-28 (1980) was cited by Justice Scalia for the proposition that a state can impose minor burdens on an

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[6] Since the operative facts of this case occurred before the *Hicks* decision, respondents may arguably contend that there was no clearly identified case which demonstrated qualified immunity for the sheriff and his deputies.

Indian retailer to assist in collecting taxes. He also cited *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114, 119 (1973) for the proposition that off-reservation crimes subject Indians to state criminal jurisdiction.

If this Court was able to conclude in *Hicks* that a state official could enter tribal lands to execute a search warrant against a tribe member suspected of having violated state law outside the reservation, then the Ninth Circuit should have been able to understand that petitioners reasonably believed that Fourth Amendment law was not clearly established to prevent using a facially valid search warrant on tribal property related to off-reservation crimes.

2. The Responsibility Of The Sheriff And His Deputies Is Not Measured By The Collective Hindsight Of The Ninth Circuit

The legal duty imposed upon Sheriff Lucas and his deputies to comply with constitutional requirements is measured by the knowledge of an objectively reasonable sheriff or his deputies. Furthermore, the actual knowledge of Sheriff Lucas and his deputies should be evaluated contemporaneously under the facts and circumstances of this case, and not by the selective hindsight of skilled attorneys and learned judges. As this Court enunciated in *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987), generalities in the law do not measure the defense of qualified immunity; the rights, which an official is accused of violating, must be sufficiently concrete that a reasonable official would comprehend that he is truly violating a person's constitutional rights. ". . . [I]n the light of pre-existing law the unlawfulness must be apparent." *Ibid.*

The controlling "pre-existing law" are the U.S. Supreme Court decisions cited by Justice Scalia in *Hicks*, as discussed *supra*. These decisions would not dissuade the Sheriff and his deputies from acting upon a facially valid search warrant; they would have encouraged them toward the conduct they pursued.

Since *McCollan* protects state officials who serve facially valid arrest warrants which deprive persons of their liberty, it is even more appropriate that sheriffs and their deputies should be further protected when they serve facially valid search warrants which deprive persons only of their property. As such, the petitioners here are entitled to qualified immunity because respondents have no clearly established constitutional right to avoid a facially valid search warrant. *See e.g.*, *Aleotti v. Baars*, 896 F. Supp. 1, 6 (D.D.C. 1995), *aff'd*, 107 F.3d 922 (1996).

3. The Petitioner Sheriff And His Deputies Reasonably Did Not Believe They Were Violating Respondents' Fourth Amendment Rights

The Ninth Circuit erroneously ruled that Sheriff Lucas could not reasonably have believed that he was not violating respondents' Fourth Amendment rights. The facts of this case do not support that finding.

First of all, Sheriff Lucas was not even on the scene; secondly, his deputies were called by investigator Nixon after she secured the facially valid warrant from the California Superior Court, and became concerned about a possible disturbance of the peace at the Casino. The deputies arrived, viewed the facially valid search warrant, which related to an alleged violation of a state welfare fraud penal statute, and expressed their belief that it was proper.

The actions undertaken by Sheriff Lucas' deputies were objectively reasonable, as a matter of law, because the deputies correctly perceived "all of the relevant facts," and even if this Court finds that the deputies had a "mistaken understanding" whether the facially valid search warrant was "legal in those circumstances," such a mistake was reasonable and "the officer is entitled to the immunity defense." *Saucier* at 205, 121 S. Ct. at 2158, 150 L. Ed. 2d at 284.

In this day and age, where innumerable facially valid search warrants must be served daily by sheriffs' offices throughout the country, sheriffs and their deputies must not be "chilled" from doing what in the normal course of their duties appears to be reasonable. It is submitted that nothing is more reasonable than serving a facially valid search warrant.

CONCLUSION

Unless this Court reverses the Ninth Circuit's decision to deny Sheriff Dan Lucas and his deputies the defense of qualified immunity – a ruling which squarely conflicts with the bright line tests of *Saucier* – all of our Nation's sheriffs, and their deputies, will be unable to perform daily their constitutional and statutory duties with any degree of regularity or confidence.

Because the Ninth Circuit erroneously denied qualified immunity regarding a facially valid search warrant to Sheriff Lucas and his deputies, this Court should now reverse the Ninth Circuit's ruling and reinstate the District Court's grant of qualified immunity to Sheriff Dan Lucas.

Respectfully submitted,

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Dated: January 22, 2003

APPENDIX A

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Arizona Sheriffs' Association
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Minnesota State Sheriffs' Association
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Missouri Sheriffs' Association
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No. 02-281 (12)

Supreme Court, U.S.
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In The
Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, Individually And As District Attorney; And DAN LUCAS, Individually And As Sheriff,

Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; And BISHOP PAIUTE GAMING CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, FLORIDA, IOWA, KANSAS, OKLAHOMA, OREGON, SOUTH DAKOTA, AND UTAH SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian Tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the Tribe's civil rights that is actionable under 42 U.S.C. § 1983.

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BRIEF OF *AMICI CURIAE*

The States of California, *et alia*, respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The *Amici* States address only the first two questions presented by Petitioners and urge reversal of the decision below.

INTEREST OF THE *AMICI CURIAE*

The decision below poses a real threat to the integrity of *Amici* States' sovereignty reserved by them under the Constitution, and in particular to their inherent authority to discharge the day-to-day governmental responsibility to seek and seize evidence of criminal activity. All *Amici* States are obligated to provide governmental services to Indians and non-Indians – including the investigation of criminal law violations outside Indian country. Such investigations may, as here, require *Amici* States to act within the boundaries of Indian country. The *Amici* States with criminal authority under Public Law 280[1] must also

[1] Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) & 28 U.S.C. § 1360 (1994)) ("Public Law 280"). Public Law 280 required six States to assume broad jurisdiction over criminal law and civil adjudication in Indian country. Other States may choose to assume Public Law 280 authority, but that choice is currently conditioned on tribal approval. *See* Indian Civil Rights Act of 1968 §§ 401-402, 25 U.S.C. §§ 1321-1322 (1994). Public Law 280's criminal jurisdiction provisions read, in relevant part, as follows:

> (a) Each of the States ... shall have jurisdiction over offenses committed by or against Indians in the areas of

(Continued on following page)

enforce their criminal laws within Indian country. In addition, the expansion of tribal gaming under the Indian Gaming Regulatory Act of 1988, and the development of other tribal enterprises, has brought tribal and non-tribal communities into closer and more regular contact. All *Amici* States are thus required to have substantial and ever more frequent contacts with Indian Tribes, on tribal lands. The decision below would allow Tribes to prevent the investigation of off-reservation crime – thereby frustrating a core state function. Such a rule of decision would add a twist to the already troubled history of state jurisdiction in Indian country that is incompatible both with this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) ("*Hicks*") and with the expectations of the States in joining the Union.

A. Historical background

Much of the confusion surrounding the scope and extent of tribal and state jurisdiction over Indian country is the result of dramatic shifts in the federal government's Indian policies over the last two hundred years. Following independence, the United States retained the British Crown's concept of Indian country, which drew a line along the Appalachian Ridge – west of which the Sovereign claimed to exercise no political control. Later, the federal

---

> Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State.

18 U.S.C. § 1162.

government segregated Tribes by placing them on reservations that non-Indians were prohibited from entering without permission from the federal government. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (denying Indians personhood under the Fourth Amendment). Next, the federal government attempted to assimilate Tribes into non-Indian society by abolishing reservations and tribal governments and selling tribal land to individuals. General Allotment Act, 24 Stat. 388 (1887). In the first half of the Twentieth Century, when the failure of the "allotment policy" was clear, the federal government began restoring its relations with tribal governments and returning lands to Tribes. Indian Reorganization Act of 1934, 48 Stat. 984 (1934). And for a brief time in the 1950's, Congress again pursued a policy of tribal termination that was typified both by the California Rancheria Act of 1958, Pub. Law 85-671, 72 Stat. 619-621, as amended in 1964, Pub. Law 88-419, 78 Stat. 390-91, and by Public Law 280 itself. *See Williams v. Lee*, 358 U.S. 217, 220 (1959); H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953).

The effects of these policy fluctuations over time have been enormous. Under the allotment policy, for example, a substantial portion of reservation land passed out of tribal ownership. *See generally* Francis Paul Prucha, *The Great Father* 896 (1984) (summarizing the types and amounts of land transferred by 1934). Accompanying this destruction of exclusive tribal territory was the elimination of tribal members' political separation through individual grants of United States citizenship in conjunction with the allotment process and, eventually, the extension of citizenship to all Indians in 1924. Act of June 2, 1924, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)). In time, Indian country was transformed from territory clearly

separate from that of the dominant culture, to territory in which Indian and non-Indian lands are jumbled together and the boundaries between them uncertain. Non-Indians residing on former tribal lands may find themselves subject to claims of regulatory or taxing authority by tribal governments in which they have no right to participate. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001). Meanwhile, tribal governments do not provide the full panoply of services and protections one generally expects a state government to provide. For example, tribal governments are barred from enforcing criminal laws against non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Consequently, tribal members also look to States and their political subdivisions to provide governmental services, including the provision of law enforcement services. *See Duro v. Reina*, 495 U.S. 676, 680-81, n.1 (1990) (describing the "complex patchwork of federal, state, and tribal law" allocating criminal jurisdiction in Indian country). The uncertainties attending these jurisdictional concerns affect all citizens, including a significant population within Indian country. The 1990 census indicates that approximately 800,000 persons resided within Indian reservations or on trust land, of whom only 54.1 percent were identified as American Indian, Eskimo or Aleut. Bureau of Census, Dep't of Commerce, 1990 Census of Population, General Population Characteristics, United States 541 (Nov. 1992).

B. The *Amici* States' immediate concerns

This case raises immediate practical concerns for Californians and for the residents of the other *Amici* States. First, giving effect to the Tribe's claim of an immunity that may bar the execution of a state search warrant

would establish an impractical and unworkable obligation upon law enforcement officers, requiring them to first determine whether a tribal government has an interest in land and/or in property that is the subject of a warrant, prior to its issuance. Additionally, the Tribe's claimed right to vindicate a sovereign power by holding state law enforcement officers personally liable under 42 U.S.C. § 1983 will chill the conduct of on-reservation law enforcement activities in all States – regardless of the situs of the crime being investigated. It is generally the case in California and in other Public Law 280 States – where the federal government has no regular law enforcement presence – that county sheriffs are the only providers of law enforcement within Indian country. A ruling adverse to the Petitioners here will provide a strong disincentive to sheriffs' deputies considering entering Indian country – possibly with profound public safety implications for reservation populations.[2]

This case also raises the specter of Indian country becoming a safe haven for criminals. Not only would the Tribe's claimed sovereign power to bar the execution of a state warrant allow criminals to operate untouched when cloaked by an official designation of tribal governmental status, but criminals anywhere within Indian country would benefit if the law enforcement community became unwilling to enter Indian country for fear of the personal liability that might attach to an inadvertent incursion

[2] The federal government recognized this practical concern in briefing submitted to this Court in *Nevada v. Hicks*. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, 2001 WL 28669, at *19-*22.

upon the land or property of the tribal government. The geographical scope of this specter is substantial. Within the ten continental States of the Ninth Circuit, there are 398 Indian Tribes occupying approximately thirty-six million acres of territory. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). In California alone, the Bureau of Indian Affairs has before it eighty-seven pending applications for the acceptance of land into trust for the benefit of Indian Tribes, totaling approximately 9,000 acres. *Internal BIA Memorandum*, October 11, 2002.[3] Under the court of appeals' decision below, any number and variety of criminal enterprises could conceal themselves within Indian country, beyond the effective reach of the state police power.

The *Amici* States' interest in this case is clear. It presents the Court with an opportunity to confirm that States of the Union have inherent authority to investigate off-reservation crimes – wherever the investigation may lead them within their territory. The decision below effects an ill-conceived and unwarranted extension of the concept of tribal sovereign immunity and erroneously grants to the Tribe previously unrecognized authority to bar the prosecution of an otherwise legitimate criminal investigation and to hold law enforcement officers personally liable for any abridgement of that purported authority. For these reasons, the *Amici* States respectfully request that the

[3] The memorandum is an appropriate subject of judicial notice. Fed. R. Evid. 201(b). Twelve copies of the memorandum have been lodged with the Clerk's Office.

decision below be reversed with instructions to the district court to dismiss the action with prejudice.

SUMMARY OF ARGUMENT

This case involves the execution by county officers of a search warrant, issued on probable cause in the course of an investigation of an off-reservation crime, commanding the search of tribally-owned buildings located within the Tribe's reservation, and requiring the seizure of specified tribal business records. When this case is considered either from the perspective of an Indian Tribe's authority to regulate the on-reservation conduct of non-Indians, or from the perspective of a State's authority over an Indian reservation within its territory, the rule must be the same – that tribal sovereignty may not prevent a State from investigating, anywhere within its territory, an off-reservation crime. This rule is mandated because a Tribe may not, consistent with its dependent status, bar a State from performing a core state function, and because the imposition of such a limitation upon the State would violate the constitutional bargain accepted at statehood. Accordingly, neither the concept of tribal "sovereign immunity," nor any other attribute of tribal sovereignty, may operate as a bar to the execution of a state search warrant.

The issues presented in this case were resolved by this Court's decision two terms ago in *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Hicks*, the State of Nevada and state officials brought a declaratory relief action in federal court against a member of the Fallon Paiute-Shoshone Tribes of Western Nevada and the Tribal court. *Id.* at 357. The

State challenged the tribal court's jurisdiction over the tribal member's § 1983 civil rights action against state officials, in their individual capacities, who had executed a search warrant on allotted land within a reservation for evidence of an off-reservation poaching crime. *Hicks, supra*, 533 U.S. at 355-57. This Court concluded that neither the Tribe's inherent sovereignty, nor its delegated authority, allowed it to "regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Id.* at 358. Nothing in *Hicks* suggests that the conduct at issue in this case fell outside the scope of the State's inherent authority. To the contrary, the Court has indicated that States have a right to enter reservations for enforcement purposes so as "'to prevent [such areas] from becoming an asylum for fugitives from justice.'" *Hicks*, 533 U.S. at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885)).

Although the Court in *Hicks* concluded that its decision was dictated by the *Montana v. United States* line of authority, which governs the scope of tribal authority to regulate non-Indians, *Hicks* is also predicated upon a State's inherent authority over tribal lands. *Hicks*, 533 U.S. at 358 (citing *Montana v. United States*, 450 U.S. 544 (1981)). An examination of the history and structure of American federalism reveals that whatever authority is vested in the federal government by virtue of the Commerce Clause, it does not include the cession of any state power to investigate an off-reservation state crime anywhere within state territory. Accordingly, such state

authority is reserved to the States by operation of the Tenth Amendment.[4]

There is also simply no conceivable basis for the court of appeals' determination that the Tribe's "sovereign immunity" would bar the execution of a state search warrant. The doctrine of tribal sovereign immunity is implicated only when an effort is made to hale a Tribe into court. As Justice Kennedy indicated in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, while "tribal immunity [from suit] extends beyond what is needed to safeguard tribal self-governance" that immunity is limited to freedom "'from judicial attack' absent consent to be sued." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998) ("*Kiowa*"). However, a search warrant does not constitute "judicial attack" upon the Tribe, but merely directs *county officers* to search for property and seize it, if found. No decision of this Court has construed tribal sovereign immunity to include an immunity from the service of process or the execution of a search warrant.

This case also presents an unprecedented effort by the Tribe to vindicate a purported incursion upon its sovereignty under a statute intended to provide a remedy for the violation of *individual* rights. Even assuming that this Court's *Hicks* decision could be meaningfully distinguished from this case, and further that the execution of the search warrant violated the Tribe's sovereign immunity, the *Tribe*

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[4] Although the Tenth Amendment generally reflects aspects of the federal-state relationship, it also sheds light on the state-tribal relationship in this context.

may not sue the county officers for a violation of an attribute of its sovereignty under 42 U.S.C. § 1983. The plain language, legislative history, and the purposes of § 1983 all establish that a sovereign entity is not a "person" within the meaning of the statute. Therefore, the Tribe, when seeking vindication for a purported incursion upon its sovereign powers, has no standing under § 1983.

ARGUMENT

I. A TRIBE'S SOVEREIGNTY MAY NOT PREVENT THE STATE FROM PERFORMING THE CORE STATE FUNCTION OF EXECUTING A SEARCH WARRANT IN THE INVESTIGATION OF AN OFF-RESERVATION CRIME

This case concerns whether, and to what extent, the State's authority to investigate off-reservation violations of the State's criminal laws – a necessary and inherent component of state sovereignty – is diminished by tribal sovereignty as a matter of constitutional law. The decisions of this Court, and the inherent powers of States as reflected in the Constitution's federal structure, indicate that the State's authority to conduct such investigations is not diminished by tribal sovereign powers. In 2001, this Court held in *Nevada v. Hicks* that state game wardens executing a search warrant upon a residence located on allotted lands within an Indian reservation were not subject to tribal court jurisdiction because the Tribe was without authority to impair the search for evidence of an off-reservation crime. *Nevada v. Hicks*, 533 U.S. at 374-75. *Hicks* is dispositive of the issues presented here.

A. The *Hicks* decision establishes that States and their subdivisions have inherent authority to execute search warrants upon Indian Tribes and their property

Although this case arises in a different procedural posture, the underlying facts here are strikingly similar to those presented to the Court in *Nevada v. Hicks*. Both cases involve a proper exercise of what the *Hicks* decision deemed to be the State's "inherent jurisdiction" on reservations to execute a search warrant in the investigation of an off-reservation crime. *Hicks*, 533 U.S. at 365. There are no meaningful distinctions between these cases.

Hicks is the progeny of well-settled authority that establishes "that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe." *Hicks*, 533 U.S. at 358-59 (following *Williams v. Lee*, 358 U.S. 217 (1959) ("*Williams*"), *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) ("*Oliphant*"), *United States v. Wheeler*, 435 U.S. 313 (1978) ("*Wheeler*"), and *Montana*, 450 U.S. at 544). These decisions all establish the bounds of tribal sovereign authority over non-Indians as follows: "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation.'" *Hicks*, 533 U.S. at 359 (quoting *Montana v. United States*, 450 U.S. at 564, emphasis added in *Hicks*). Here, as in *Hicks*, the Tribe's efforts to bar the execution of the County search warrant did not serve to protect tribal self-government, promote control of internal relations, or

promote any other legitimate tribal interest. It was therefore incompatible with the dependent status of the Tribe.

In *Williams v. Lee*, this Court ruled that an Arizona court lacked jurisdiction over a civil suit brought by a non-Indian against an Indian where the cause of action arose on the reservation and the Tribe had a sophisticated legal system that exercised broad civil jurisdiction over disputes brought by outsiders against Indian defendants. *Williams*, 358 U.S. at 223. The Court recognized that the principles first articulated by Justice Marshall in *Worcester v. Georgia* have been modified over time and that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams, supra*, 358 U.S. at 220 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the Cherokee Nation is a distinct community, occupying its own territory in which the laws of Georgia have no force and into which the citizens of Georgia have no right to enter)). Under the unique circumstances presented by the Navajo Nation in *Williams*, the Court ruled that Arizona's exercise of civil jurisdiction over an on-reservation claim would indeed infringe upon the Tribe's right "to make their own laws and be ruled by them." *Id.* at 220. Indeed, recognition of the right of Tribes to make their own laws and be ruled by them remains a touchstone for determining the appropriate scope of tribal authority over non-member conduct. *Hicks*, 533 U.S. at 360-61. It is the basis of the Court's determination that Indian Tribes lack inherent criminal jurisdiction to try or punish non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 212, and of the rule that the power to punish *tribal members* for criminal offenses is an attribute of

retained tribal sovereignty, *United States v. Wheeler*, 435 U.S. at 323-24.

Although in *Williams*, Arizona's exercise of civil jurisdiction was barred, the Court's reasoning restrained the scope of tribal authority over non-Indians. In adopting the reasoning of *Williams*, both *Oliphant* and *Wheeler* expressly recognized the limited nature of tribal sovereignty. In *Oliphant*, then-Associate Justice Rehnquist noted that "Indian tribes are prohibited from exercising the powers of autonomous States that are expressly terminated by Congress *and* those *'inconsistent with their status.'*" *Oliphant*, 435 U.S. at 208 (alteration in original) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)). In *Wheeler*, Justice Stewart, for a unanimous Court, noted that Indian Tribes possess only those aspects of sovereignty not withdrawn by treaty or statute, or "by implication as a necessary result of their dependent status." *Id.* at 323. The Court distinguished between Tribes' retained inherent powers and divested powers as follows:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only *the relations among members of a tribe*. Thus, they are not such powers as would

> necessarily be lost by virtue of a tribe's dependent status.

United States v. Wheeler, 435 U.S. at 326.

Three years later, in *Montana v. United States*, 450 U.S. 544, Justice Stewart elaborated upon *Wheeler*. *Montana* involved an attempt by the Crow Indian Tribe to prohibit hunting and fishing activities by non-Indians on lands within the boundaries of the Tribe's reservation, but owned in fee by non-Indians. *Id.* at 547. The Court held that the Tribe's attempt to regulate such hunting and fishing bore "no clear relationship to tribal self-government or internal relations" and was not compatible with "general principles of retained inherent sovereignty." *Montana*, 450 U.S. at 564-65. Yet *Montana* does indicate that in addition to the punishment of tribal members, "Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, . . . to prescribe rules of inheritance for members" and to exercise civil authority over non-Indians within a reservation when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 564 (identifying *Montana*'s "second exception" to the rule that the inherent powers of Tribes do not extend to non-members).[5] More recent decisions of this Court are in accord with the notion that the *Montana* decision defines the outer perimeter of tribal sovereignty over non-Indian

[5] The "first *Montana* exception" covers the "activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.

conduct. *See Strate v. A-1 Contractors*, 520 U.S. 438, 456, 459 (1997) (following *Montana* and holding that a tribal court could not entertain a civil action against non-members absent a federal statute or treaty granting such authority to the Tribe); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 646 (2001) (holding that the *Montana* rule that inherent sovereign powers of an Indian Tribe do not extend to non-Indians was applicable to prohibit the Navajo Nation's attempt to tax guests of a non-Indian-owned hotel located on fee lands within the boundaries of the reservation). The *Strate* decision, in particular, presaged the result in *Hicks*. In *Strate*, this Court rejected a Tribe's efforts to assert adjudicatory jurisdiction over a traffic accident involving non-Indians within a section of State highway on a right-of-way running through an Indian reservation. *Strate*, 520 U.S. at 442-43. Writing for an unanimous Court, Justice Ginsberg clarified that the scope of a Tribe's inherent powers do not reach "beyond what is necessary to protect tribal self-government or to control internal relations" and ruled that "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459.

Thus, the Court in *Hicks* indicated that the proper question presented by the execution of the search warrant was "whether regulatory jurisdiction over state officers . . . is 'necessary to protect tribal self-government or to control internal relations,' and, if not, whether such regulatory jurisdiction has been congressionally conferred." *Hicks*, 533 U.S. at 360. In *Hicks*, the Court considered the powers that are necessary for a Tribe to protect self-government and control internal relations to be those referred to in

Montana: "tribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'" *Hicks*, 533 U.S. at 360-61 (quoting *Strate v. A-1 Contractors*, 520 U.S. at 459). Balanced against these recognized tribal interests, the Court noted that inherent tribal authority does not exclude all state regulatory authority on the reservation. *Hicks*, 533 U.S. at 362. To the contrary, generally an Indian reservation is considered part of the territory of the State and so "state sovereignty does not end at a reservation's border," and when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. . . . " *Hicks*, 533 U.S. at 361-62 (recognizing that the Court long ago departed from the platonic notions of tribal sovereignty articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. at 561).

In *Hicks*, this Court concluded that the power to regulate state officers in the execution of process related to the off-reservation violation of state law is not essential to tribal self-government or internal relations, but that such state jurisdiction over reservations is "inherent," and carries with it authority for state officers to execute process on tribal lands. *Id.* at 363-65. "The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the Tribe's self-government than federal enforcement of federal law impairs State government." *Id.* at 364.

The only noteworthy factual distinctions between this case and *Hicks* are that the location searched and the property seized belonged to a Tribe, and that California is a Public Law 280 State. However, these factual distinctions would not justify an outcome different from *Hicks*.

First, the Court has never distinguished between tribal members and Tribes when determining the scope of state authority within Indian country. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147 (1980) (applying a balancing test and holding that the State of Washington's imposition of sales taxes upon tribally-operated cigarette sales was valid). And for reasons identified in section B below, giving this distinction any prejudicial effect to state interests would be inappropriate. Moreover, the fact that California is a Public Law 280 State is analytically irrelevant.[6] However, to the extent California's Public Law 280 status should inform the Court's review, it actually militates against Respondents' position because Public Law 280 provides California with express authority to enforce state criminal laws within Indian country. Thus, the enactment of 18 U.S.C. § 1162 demonstrates Congress' determination that *federal* interests are furthered by comprehensive state

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[6] The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law enforcement activity within Indian country – even that which relates to the commission of an off-reservation crime. *Bishop Paiute*, Pet. App. 16a. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of whether Congress intended to abrogate tribal sovereign immunity under Public Law 280. But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime. Public Law 280 grants that, "Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . " 18 U.S.C. § 1162(a). *See also Hicks*, 533 U.S. at 366 (noting that Public Law 280 applies only to crimes committed in Indian country).

criminal jurisdiction – this determination is irreconcilable with the notion that tribal lands may be a safe haven for evidence of off-reservation criminal activity. Accordingly, this action is controlled by *Hicks*.

B. States did not relinquish authority to investigate off-reservation crimes anywhere within their territory as part of the constitutional bargain

The federal structure of the United States Constitution provides a critical insight into the proper resolution of this case, and indicates that States must have retained their authority to investigate off-reservation crimes everywhere within their territory – including within reservation land. The conclusion reached in *Hicks*, that States have inherent authority to execute a search warrant on tribal property, is wholly compatible with, and indeed mandated by, the nature of American federalism and of Indian Tribes' dependant status. Any other conclusion would detract from retained State sovereignty. The "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 1870 (2002) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

Congress' plenary authority over Indian affairs under the Indian Commerce Clause is derived from the several States. The Federalist No. 42, at 282 (James Madison) (describing Commerce Clause authority as part of the "third class" of powers lodged in the general government). Accordingly, if it were not for the States' delegation of

authority to regulate commerce "with the Indian tribes," the States would retain the same plenary authority. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Since Chief Justice Marshall's seminal trilogy of Indian law decisions, Indian Tribes have been understood to be "domestic dependent nations" with a relationship to the federal government that resembles that of a "ward to his guardian." *Worcester v. Georgia*, 31 U.S. at 515; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Johnson v. M'Intosh*, 21 U.S. at 543. Conceptually, the federal guardianship over Indian Tribes was passed from the British Crown in the 1783 Treaty of Paris, through the separate States upon adoption of the Constitution, to the federal government. Definitive Treaty of Peace, United States-Great Britain, 8 Stat. 82; *see Johnson v. M'Intosh*, *supra*, 21 U.S. at 584-85; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting). It also follows that, as sovereigns succeeding to Great Britain's territorial sovereignty, the States have had inherent authority to perform core governmental functions, like the investigation of crimes, throughout their territory from the time of the Constitution's framing.

To the extent the constitutional design demonstrates that the States did not cede power to the federal government, it is retained by the States, and so could not be preempted by the exercise of tribal sovereignty. The authority of the States to conduct investigations of off-reservation crimes anywhere within their territory is one such retained state power. Because it is doubtful that even Congress would have authority under the Indian Commerce Clause to prevent States from investigating off-reservation crimes, endowing tribal sovereign immunity with such an effect would be extremely imprudent. Article

I is subject to the constraints of not only the Tenth and Eleventh Amendments, but also to those fundamental attributes of state sovereignty that are implicit in the constitutional design. *See Alden v. Maine*, 527 U.S. 706, 713, 730 (1999) (Congress may not abrogate States' immunity from private suit in state court under a statute enacted pursuant to its Commerce Clause powers); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59-63 (1996) (Eleventh Amendment precludes Congress from subjecting States to unconsented suits by Indian Tribes under the Indian Gaming Regulatory Act and the Indian Commerce Clause); *New York v. United States*, 505 U.S. 144, 167-69 (1992) (Congress lacks authority directly to compel the States to require or prohibit acts identified in federal legislation). Although these constitutional provisions govern relations between the federal government and the States, they are illustrative of residual state power. Accordingly, there is simply no constitutional basis for the conclusion that the States have relinquished inherent state jurisdiction to investigate crimes occurring beyond the borders of Indian country to Indian Tribes – even when the investigation leads onto an Indian reservation.

C. The doctrine of tribal sovereign immunity has no applicability in the context of this case

The Tribe's sovereign immunity does not provide it with authority to bar the execution of a search warrant by County officers. The court of appeals' decision below, finding that sovereign immunity provides such authority, *Bishop Paiute*, Pet. App. 42a, n.7, is rooted in a misconception of the nature of tribal sovereign immunity – both with

respect to the authority it provides and the extent to which it may be applied against a State exercising core functions. First, sovereign immunity is an immunity from suit, not an immunity from service of process, the execution of which implicates no legitimate sovereign interest. *See Nixon v. Fitzgerald*, 457 U.S. 731, 759 (1982) ("It is one thing to say that a President must produce evidence relevant to a criminal case, as in [*United States v.*] *Burr* [25 F.Cas. 30 (No. 14,692d) (Cir. Va. 1807)] and *United States v. Nixon*, [418 U.S. 683, 706 (1974),] and quite another to say a President can be held for civil damages for dismissing a federal employee").[7] In *Van Cauwenberghe v. Biard*, a civil defendant moved for dismissal on the ground that he had been immune from service of process because his presence in the United States had been

[7] An analogy may be found in the concept of executive privilege. *See United States v. Nixon*, 418 U.S. 683, 706 (1974) (holding that neither the doctrine of separation of powers nor the need for confidentiality of high-level communications can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances). In *United States v. Nixon*, this Court upheld the denial of President Nixon's motion to quash a subpoena duces tecum for audio tapes and documents sought by the United States Attorney General during the Watergate investigation. *United States v. Nixon*, 418 U.S. at 684. In rendering its decision, the Court remarked upon the "ancient proposition of law" that "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Id.* at 709 (citing *United States v. Bryan*, 339 U.S. 323, 331 (1949) (quoting 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961)). These privileges, Chief Justice Burger noted, are those "weighty" interests addressed in the Fifth Amendment protection against compelled self-incrimination, and in the attorney-client and priest-penitent relationship. *Id.* at 709-10. "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for, they are in derogation of the search for truth." *Id.* at 710.

compelled by extradition to face criminal charges. However, this Court noted that, "[t]he critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)), and held that the immunity from service of process defendant asserted was not an immunity from suit – even though service was essential to the trial court's jurisdiction over the defendant. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988). The search warrant executed by the County officers in this case did not hale the Tribe into state court, and so did not infringe on the Tribe's immunity from suit. To the contrary, the search warrant merely engaged County officers in the search for truth by commanding them to seek evidence of an off-reservation crime.

Nor does the Court's most recent decision on the scope of tribal sovereign immunity support its exercise in the context of this case. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court extended for the first time a Tribe's sovereign immunity from suit to an action arising from the Tribe's off-reservation commercial activities. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 764 (1998) (Stevens, J., dissenting) (Tribe entitled to sovereign immunity from suit in state court on promissory note regardless of whether it was signed on or off the reservation). However, in doing so, the Court noted that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. In particular, the Court noted that in "our interdependent and mobile society, . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." *Id.* Particularly in this

context, expanding the scope of the tribal sovereign immunity doctrine to include a never-before-recognized power to bar state investigations of off-reservation crimes would be imprudent. If the decision below is not overturned, Tribes might argue in future cases that, because the *Kiowa* decision recognizes tribal sovereign immunity to insulate Tribes from suits arising from their off-reservation commercial activities, tribal sovereign immunity may also bar the execution of a search warrant directed at off-reservation land and property owned by the tribal government. Such reasoning would presumably allow the creation of an asylum for fugitives *anywhere* within a State, provided a tribal government claimed an interest in the subject of the search.[8]

Furthermore, the peculiar origins of the doctrine of tribal sovereign immunity suggest that this case would be an inappropriate vehicle for a further expansion of the doctrine's scope. Though the doctrine of tribal immunity is settled law, this Court noted in *Kiowa* that it "developed almost by accident." *Kiowa*, 523 U.S. at 756. Justice Kennedy described tribal sovereign immunity as having emerged from a misapplication of *Turner v. United States*, 248 U.S. 354 (1919), the Court's later decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), and Congress' acceptance of the doctrine and reliance upon the Court's many decisions in which the doctrine was reiterated. *Kiowa*, 523 U.S. at 756-58. *See,*

[8] The States do not intend to suggest that tribal governments would necessarily be, or are likely to be, criminal conspirators. However, these concerns would also be relevant in the context of non-tribal member criminals taking advantage of, for example, commercial dealings with tribal governments to conceal evidence of off-reservation crimes – even without the consent or knowledge of the tribal government.

e.g., Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-891 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165, 167 (1977). In light of these decisions, tribal sovereign immunity's origins in federal common law, and Congress' better vantage point to consider the policies implicated by the doctrine of tribal sovereign immunity, this Court declined in *Kiowa* to modify the doctrine and instead deferred to Congress to alter its limits through explicit legislation. *Kiowa*, 523 U.S. at 759-60, 763 (Stevens, J., dissenting). Similarly, the Court should not allow any judicial expansion of the docterine here.

Finally, and perhaps more fundamentally, because tribal sovereign immunity is merely one twig within the Tribe's bundle of sovereign powers, it would indeed be paradoxical to conclude that tribal sovereign immunity could exceed the scope of tribal sovereignty itself. From the discussion in Sections I.A and I.B, above, it is established that tribal authority may not bar the execution of a search warrant in the investigation of an off-reservation crime. Accordingly, neither may the doctrine of tribal sovereign immunity.

II. A TRIBE MAY NOT SUE UNDER § 1983 TO REMEDY AN ALLEGED INCURSION UPON A SOVEREIGN PREROGATIVE

For all the reasons stated in Section I, above, the Tribe's claim that its sovereign immunity bars the execution of a search warrant is without merit and the actions

of the County officers did not violate any federal law. Setting aside the infirmity of the Tribe's claims for the purposes of discussion, even if the Tribe establishes a violation of federal law, it may not seek damages for the purported incursion upon a *sovereign prerogative* under a statute intended to redress the most grievous violations of *individual rights*. This Court should rule that the Tribe's status as a domestic dependent sovereign, upon which status rests the Tribe's claim that its sovereign immunity has been violated, perforce deprives the Tribe of standing as a "person" within the meaning of 42 U.S.C. § 1983 when the Tribe is seeking vindication of a sovereign interest.

Section 1983 originated in section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and § 1 of the Civil Rights Act of 1871, Ch. 22, 17 Stat. 13 (now codified as amended at 42 U.S.C. § 1983). Commonly referred to as the Ku Klux Klan Act, § 1983 was enacted by Congress to provide a federal statutory "sword" in enforcing the Thirteenth and Fourteenth Amendments. *See* Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441 (1989). In *Monroe v. Pape*, the Court confirmed that the Reconstruction Congress intended to provide a cause of action for violations of constitutional rights committed by "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961), overruled in part by *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658 (1978).[9]

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[9] In *Monell*, the Court determined that the legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress intended municipalities and other local government units to be included

(Continued on following page)

The purposes of the Fourteenth Amendment were first explained by this Court in *The Slaughter-House Cases*, in which the Court ruled that the Equal Protection Clause of the Fourteenth Amendment was never intended to protect business or contractual interests from an exercise of a State's police powers. *The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872). This decision was rooted in the understanding that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Fourteenth Amendment], and by it such laws are forbidden." *Id.* at 81. Section 1983 was expressly authorized in the final section of the Fourteenth Amendment, U.S. Const., amend. XIV, § 5, and was intended to provide a remedy when States failed to conform their laws to the Fourteenth Amendment's requirements. *Id.*

This understanding of the historic purposes of § 1983 was confirmed by the Court in *Mitchum v. Foster*: "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Though § 1983 has, since *The Slaughter-House Cases*, been used to remedy a broad range of *individual* rights

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among those "persons" who are subject to suit under § 1983 – owing to their corporate nature. *Monell*, 436 U.S. at 688-90.

violations, there is no precedent, other than the decision below, for § 1983 being recognized as a remedy for a perceived violation of an attribute of sovereignty. Those lower court decisions permitting Tribes to bring § 1983 actions did not involve purported violations of a sovereign power or did not address whether Tribes are "persons" within the meaning of § 1983. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 663 F. Supp. 682, 686 (W.D. Wis. 1987) (Tribe is a person under § 1983 in action involving Tribe's enforcement of communal hunting and fishing rights "on behalf of its members"); *Confederated Salish and Kootenai Tribes of Flathead Reservation v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976) (no consideration to Tribe's status as a "person" under § 1983 in claim for violation of Commerce Clause rights); *Quinault Tribe of Indians of the Quinault Reservation v. Gallagher*, 368 F.2d at 653 (dismissed on other grounds); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 747, n.13 (E.D.Wash.1985) (noting, without deciding, that it is a "novel question" whether Tribes are persons within the meaning of § 1983).

Section 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity [or] . . . . " 42 U.S.C. § 1983. It is established beyond any doubt that under § 1983, a sovereign or a governmental entity is not subject to suit as a "person"

within the meaning of the statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989) (stating that neither States nor state officials acting in their official capacity are "persons" *subject* to suit under § 1983). There is no reason to believe that the term "person" was intended by Congress to have two different meanings within the same sentence of § 1983. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 597 (1995) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning"). Accordingly, if "person" within the meaning of § 1983 may not include a governmental entity for the purpose of being subjected to suit, presumably it does not include a governmental entity for the purpose of bringing suit either.

Although this Court's leading precedent establishing that a State is not a "person" within the meaning of § 1983 related to the State of Michigan's status as a defendant, the decision's discussion of concepts of sovereignty is just as applicable to Indian Tribes and to the concept of tribal sovereignty. *Will*, 491 U.S. 58, 71. This Court has noted that in common usage the term "person" does not include a sovereign, and statutes employing the word "person" are ordinarily construed to exclude sovereigns. *Id.* at 64. *See also Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 780-81 (2000) (noting that the Court's "longstanding interpretive presumption that 'person' does not include the sovereign" and that although "the presumption is, of course, not a 'hard and fast rule of exclusion,' ... it may be disregarded only upon some affirmative showing of statutory intent to the contrary."). In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), the Court's review of § 1983's legislative history led it to determine that the Territory of Guam is not a "person" within the

meaning of the statute. The Court found that Congress was concerned with enforcing the provisions of the Fourteenth Amendment and in particular was concerned about the insecurity of life and property in the South during the Era of Reconstruction. *Id.* at 187-88. "[T]he remedy provided by § 1983 was designed to combat the perceived evil. . . . 'Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.'" *Id.* at 189 (quoting *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973)). The Court in *Ngiraingas* also relied upon the Dictionary Act, which originally defined "person" to include the phrase "bodies politic and corporate." However, the Act's amendment in 1874 omitted those three words and substituted "partnerships and corporations," eliminating any confusion that the word "person" may be generally understood to include sovereign political entities. *Id.* at 190-91; *see also Will*, 491 U.S. at 69 ("[W]e disagree with Justice BRENNAN that at the time the Dictionary Act was passed 'the phrase "bodies politic and corporate" was understood to include the States.' ... Rather, an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States. ... (In our view, the Dictionary Act, like § 1983 itself and its legislative history, fails to evidence a clear congressional intent that States be held liable).")

The text, legislative history and purposes of § 1983 establish that Congress excluded sovereignties from the definition of "person." The Ninth Circuit's conclusion to the contrary should be reversed.

CONCLUSION

The *Amici* States urge the Court to reverse the decision of the Ninth Circuit Court of Appeals below.

Respectfully submitted,

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No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE*, CALIFORNIA STATE SHERIFFS' ASSOCIATION, IN SUPPORT OF PETITIONERS

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INTRODUCTION

The opinion of the Ninth Circuit Court of Appeals serves to establish hundreds, and with the growth of so-called "Indian Land" perhaps many more, tribal enclaves that are now virtual sanctuaries where evidence of off-reservation (as well as on-reservation) criminal enterprise may be locked away, immune from a search by law enforcement officers who are investigating the violation of state crimes, even where, as here, those state law enforcement officers have obtained a search warrant satisfying the probable cause requirements of the Fourth Amendment.

Furthermore, by the very reasoning of the Ninth Circuit, the same process of locking away from state law enforcement officers could be applied with equal force of law where a tribal official deigns to place behind a closed "tribal" door a perpetrator . . . be he or she a Native American or not . . . for whom state law enforcement officers possess a warrant of arrest in satisfaction of every Fourth Amendment protection concerning reasonable cause as well as magisterial review and approval.

These enclaves of a safe haven for the secretion of evidence and perpetrators are not limited to some remote wilderness, desert or high plains prairie where the issue is seldom likely to arise. Rather, they are the tribal commercial gambling casinos, which are proliferating throughout the nation, other tribal operated businesses such as ski resorts, the offices of Indian tribal agencies, and other tribal offices and properties, located throughout the various reservations and

other Indian country[1] within the Western States comprising the Ninth Circuit.

The effect of the Ninth Circuit's opinion regarding tribal sovereign immunity vis-a-vis state law enforcement investigation of state crimes is crucial in its impact on all 58 counties that comprise the State of California. This is because every state law enforcement official . . . the sheriff in each of the 58 counties in California, any one of the more than 400 municipal chiefs of police throughout California, any one of the state level law enforcement officials such as the California Department of Justice, the California Highway Patrol, the State Department of Motor Vehicles, the State Park Police, the Department of Fish and Game, just to name but a few . . . may find him/herself either investigating a crime or seeking a perpetrator on Indian land within his/her home county, or may even in the case of an official in a metropolitan jurisdiction, find him/herself pursuing an investigation and/or a perpetrator onto Indian land, albeit not within the home county.

Your Amici, the California State Sheriffs Association (CSSA), represents every elected sheriff of the 58 counties of the State of California serving a population of more than 34 million people throughout an area encompassing more than 163,000 square miles. CSSA is familiar with the questions of law and fact involved in this case and how the resolution of the questions presented herein may affect the entire law enforcement community. This case raises an issue of critical

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[1] Amici do not use the term "Indian country" in any pejorative or denigrating sense, but rather as a term of art commonly used by Native Americans and others to describe land over which a Native American tribe asserts dominion.

importance to law enforcement agencies in the State of California and the public they serve: Whether the doctrine of tribal sovereign immunity enables Indian tribal officials to prohibit state law enforcement officials, armed with a search warrant duly executed by a magistrate in full compliance with the Fourth Amendment, from searching tribal-owned/operated premises and/or facilities for evidence, or the perpetrator, of a state law violation.

Indeed, the decision of the Ninth Circuit in this case has such far reaching and potentially dire consequences, and is of such national importance, that the rule of law regarding search of "Indian land" pursuant to warrant must be settled by this Court.

It is for these reasons that this case is one appropriate for this Court's treatment, and is one which is most appropriate to amicus curiae briefing.

I. THE NINTH CIRCUIT DECISION RENDERS ILLUSORY THE PROMISE OF PUBLIC SAFETY IMPLICIT IN PUBLIC LAW 280

Title 18 U.S.C. § 1162 provides that so-called Public Law 280 states have jurisdiction to enforce state penal statutes on Native American tribal lands. What this means in its simplest terms is that state law enforcement authorities in a Public Law 280 state have jurisdiction to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory. Id. It is important to note that, unlike three of the six states enumerated in Public Law 280, California was given jurisdiction over "all Indian

country within the State" (Id.), whereas the statute excluded certain Indian lands from the criminal jurisdiction of other states.

That this law was enacted, and that this grant of state law enforcement authority was extended to tribal lands, is founded in the policy of ensuring that law enforcement protection on tribal lands was adequate to serve the needs of tribal members and the public interest. 106 Senate Report 327. But § 1162 is simply one manifestation of Congress' continuing concern with the welfare of Indian tribes under federal guardianship. Indeed, in adopting § 1162, Congress singled out certain reservations to remain subject to federal criminal jurisdiction. Congress' selective approach in § 1162 reinforces, rather than undermines, the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution. Furthermore, as stated by the Ninth Circuit Court of Appeals itself, Congress delegated to the States broad powers over criminal matters "because Congress' 'primary concern' lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement. . . ." Confederated Tribes of Colville Reservation v. State of Wash., 938 F.2d 146, 147 (9th Cir. 1991).

The Court ruled in U.S. v. Kagama, (1886) 118 U.S. 375 that the prosecution of major crimes did not fall within Congress's power to regulate commerce with the Indian tribes, but it ruled that the trust relationship between the federal government and the tribes conferred on Congress both the duty and the power to regulate tribal affairs. The ruling implied that because Indian tribes are wards of the United States, Congress has the power to regulate the tribes, even to the point of interfering with their essential sovereign power to deal with criminal offenders within Indian country.

To find that Public Law 280 would on the one hand confer on state officials enforcement authority on Indian land while at the same time countenance that this authority could be lawfully thwarted by the simple device of a tribal official asserting tribal immunity as to records -- or tomorrow, perhaps a perpetrator -- held behind lock and key is a legal absurdity and renders the promise of public safety implicit in the enactment of Public Law 280 illusory and of no more substance, duration or meaning than a puff of smoke.

II. THE NINTH CIRCUIT DECISION BELOW NULLIFIES THE PUBLIC POLICY OF RIGHTS AND RESPONSIBILITIES WHICH UNDERLIES OUR SYSTEM OF ORDERED LIBERTY

The issue before this Court strikes at principles so profound and deeply rooted in the foundation of our Republic as to predate the framing of the Constitution and the establishment of our system of ordered liberty.

The Framers -- John Adams, Thomas Jefferson and others -- brilliant though they were, did not fashion such a lasting governmental framework as ours out of whole cloth. Much as they and their writings continue to influence us today, so likewise were they influenced by the major social philosophers of their time; writers such as Locke, Rousseau and Hobbes.

Under the social theories of John Locke, civil liberty and natural liberty depend on compliance with valid restraints. According to Locke, laws must comport with natural right, while procedurally they must issue from a duly constituted authority, such as a government or a legislature established by a social contract. Any interference with someone's actions requires a valid reason, and procedural liberty is the right of

living under a duly constituted government. (Peter Laslett, Introduction to John Locke, Two Treatises of Government 46-49 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). Simply stated, Locke's social contract stands for the principal that to enjoy the benefits of society, one has to be prepared to sacrifice that measure of natural liberty necessary to ordered liberty.

Similarly, Rousseau observed that "[t]he passage from the state of nature to the civil state produces a very remarkable change in a man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Although, in this state, he deprives himself of some advantages which he got from nature, he gains in return others so great. (Rousseau, The Social Contract, 1762)

And according to the theories of Thomas Hobbes, "The advantages of government are so great that it is worth sacrificing some of our freedom in order to bring about these advantages." Stephen Nathanson, Should we Consent to be Governed? A Short Introduction to Political Philosophy, 70 (Wadsworth Publishing Company 1992). For, in the absence of government, the resultant "state of nature" would be one where conflict between people is inevitable , and "no one can be confident that he will do well in this state of conflict. Everyone is vulnerable to death, injury, and other losses at the hands of other people." The state of nature would be a " war of all against all" and human life would be " solitary, poor, nasty, brutish, and short." Id. at 71. Is not this "state of nature" as described by Hobbes akin to the "state of lawlessness" on tribal lands which Congress sought to end through the enactment of Public Law 280? Confederated Tribes of Colville Reservation v. State of Wash., supra at 147. Indeed, Hobbes' writings demonstrate for us today, as

they demonstrated to the Framers, how it can be legitimate to give up some of our freedom and to limit the freedom of others in the interests of survival and other important values. This is the essence of the ordered liberty embodied in our system of laws, including Public Law 280.[2]

Ordered liberty provides for freedom within assumed societal goals and values as opposed to freedom from assumed goals and values. Specifically, ordered liberty permits cultural pluralism within boundaries that the majority is willing to tolerate, so that the liberty we are afforded is not unfettered, but rather bounded by prevailing social dictates. " The Seattle Compromise: Multicultural Sensitivity and Americanization, Doriane Lambelet Coleman, 47 Duke L.J. 717 (1998).

Lockean theory continues to be recognized and embraced to the current time, as seen in City of Boerne v. Flores, 521 U.S. 507, a case dealing with religious exercise, wherein the theories of John Locke were referred to as "the right 'to do only what was not lawfully prohibited,' (West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. of Law, Ethics & Public Policy 591, 624 (1990)). The social theories of both Locke and Rousseau on submission to governance by the consent of the governed were

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[2] While it might be argued that the theories of Hobbes could also be cited for the proposition of tribal immunity as a sovereign (see, e.g., Crain v. Government of Guam, (1952) 195 F.2d 414), it is important to note that in the instant case the records which Inyo County officials sought by way of search warrant, and which "tribal officials" denied them, were not records related to tribal governance, but rather were simply records maintained by the tribal casino in its role as an employer.

commented upon by the Eleventh Circuit Court of Appeals in its 1993 decision in United States v. Forney, (11th Cir., 1993) 9 F.3d 1492, 1508 [The consent theory of government, expounded by philosophers such as John Locke and Jean Jacques Rousseau and adopted by our founding fathers, supports the concept of a government *entrusted* by the people with carrying on the affairs common to us all."]

Against this backdrop, recall that Public Law 83-280 was enacted "because Congress' 'primary concern' lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement . . . ." Confederated Tribes of Colville Reservation v. State of Wash., supra at 147. This law was, then, enacted expressly to help Native Americans living on reservations move from a state of lawlessness to one of the rule of law; from the "natural state" to the civil or societal state where; to the system of burdens, benefits, checks and balances we know as "ordered liberty." This is to the end that, to paraphrase the philosopher Cato, the government – "a Few" – might attend upon the affairs of all so that everyone might, with more security, live their lives in an environment of societal health, welfare and safety. (Thomas Gordon, Cato's Letter, No. 38, 22 July 1721, reprinted in 1 Phillip B. Kurland & Ralph Lerner, The Founders' Constitution, at 46 (1987))

Yet what the Circuit Court of Appeals has accomplished through its decision is to establish that investigation of any crime and/or arrest of any alleged perpetrator can at any time be thwarted by a "tribal" official placing evidence and/or the perpetrator of such criminal offense behind the barrier of a "tribal" veil. In this instance, the investigation was of welfare fraud alleged to have been committed by tribal members. In the next instance, it could on the Ninth Circuit's reasoning as easily be a crime or arrest

where the victim is a tribal member. For there would be nothing to prevent a tribal official from deciding that the investigation is unwarranted; that the perpetrator is innocent; or, that the perpetrator is a tribal official -- or a friend or relative of a tribal official -- and so is deserving of being shielded behind a "tribal" door. Does this not then become the rule of men rather than the rule of law?

If this is deemed a hyperbolic stretch, then subject the Circuit Court's reasoning to the Socratic challenge of "if not, why not." If the tribal official in the instant case can do this and not only be free from penal sanction, but be entitled to civil relief as the "victim" of police misconduct, why then cannot the same or another tribal official in any Public Law 280 state be free to declare tribal sovereignty as a bar to a criminal investigation which, for any reason or none, the tribal official decides will not go forward? The answer is that there would be nothing to prevent a fleeing felon from crying out "I claim sanctuary" from inside the cassino doors like some latter day Hunchback of Notre Dame, nor to prevent a "tribal" garage from becoming the repository of stolen cars. And to reject this argument on the basis that no tribal official would do so can only be met with the challenge that one asks the Inyo County officials if they ever imagined that a "tribal" official would have barred their way when executing a duly authorized search warrant for criminal evidence held in that "tribal" file cabinet.

And the net effect of this is not simply to deprive state governments of police authority over tribal lands and tribal members. The broader effect of this is to deprive tribal members, as well as every other citizen of such a state, of both the benefits and the burdens of ordered liberty. It is to potentially take tribal lands and return them to the condition of lawlessness which Congress specifically sought to prevent

in enacting Public Law 280. It is to nullify the very social contract which lies at the heart of our system of liberty and governance.

III. INYO COUNTY OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY

In order to defeat a qualified immunity defense, the plaintiff must demonstrate that the right alleged to have been violated was established in a particularized way. Anderson v. Creighton, (1987) 483 U.S. 635(on remand 724 F.Supp. 654 (D. Minn. 1989)) ; Lopez v. Robinson (4th Cir. MD 1990); Nicholson v. Georgia Department of Human Resources, (11th Cir. GA 1990) 918 F.2d 145. It is insufficient for a plaintiff to advance a violation of a broad abstract right even though it is clearly established in a generalized sense. Anderson v. Creighton, supra.

Before a defendant can be denied qualified immunity on a claim of violating a plaintiff's right, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. It is therefore essential to avoid abstraction in the determination of claims of qualified immunity in favor of "studying how these abstractions have been applied in concrete circumstances." Barts v. Joyner, (11 Cir., 1989)(cert. Denied, 493 U.S. 831(1989)). See also Cooper v. Dupnik, (9th Cir. 1991) 924 F.2d 1520, 1583 ["closely analogous cases, decided before the defendant acted . . . are often required to find a constitutional or statutory right is clearly established"]; and, Auriema v. Rice, (7th Cir. 1990) 910 F.2d 1449 ["The test for (qualified) immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted."].

This Court's ruling in Malley v. Briggs, (1986) 475 U.S. 335, defines the meaning of the term "reasonable official" in this context: it means an official who stands outside the realm of "the plainly incompetent or those who knowingly violate the law . . . " 475 U.S. at 341. In order to deny an official the ample protection of the rule of qualified immunity, it must be obvious to any but the plainly incompetent official that the given conduct is violative of "clearly established law." If officials of reasonable competence can disagree, immunity must be recognized. As the court stated in Romero v. Kitsap County, supra., 931 F.2d at 627-28, two of the primary inquiries in considering the defense of qualified immunity, i.e., the identification of the specific right allegedly violated and the determination of whether that right was so clearly established as to alert a reasonable officer to the constitutional parameters of that right, "present pure questions of law."

In this light, consider the conduct at issue in this case. The Inyo County officials, once confronted with the refusal of the tribal cassino officials to disclose the employment records being sought, did not bull-dose their way forward with some flagrant display of force and in complete disregard for the Fourth Amendment rights of the tribal cassino employer. They politely and discretely withdrew, and then did what every court in this nation has for decades been telling police officers to do; they went to a magistrate for approval of a search warrant based on probable cause. Once that state magistrate . . . for, after all, the sheriffs deputies were seeking to enforce a state penal statute . . . issued that warrant commanding the search at issue, the officials returned to the cassino, where they were again met with the refusal of "tribal" officials to give them access to the records identified in the search warrant. The sheriffs officials then did what any police officer would do under the circumstances, and cut the

lock to the records.

Confronted with these circumstances, what would a reasonable law enforcement official have known? They would have known that:

- They were investigating an alleged violation of a state penal statute, namely welfare fraud.

- They would have known that they had a search warrant, which their training and experience would have told them was required by the Fourth Amendment.

- They would have known that more than four decades earlier Congress had enacted Public Law 83-280 naming six states, California among them, as having law enforcement jurisdiction over state law violations occurring on tribal lands, or alleged to have been committed by tribal members.

- They would likely also have been aware of the holding by the Ninth Circuit Court of Appeals itself, stating that "[i]f the law is classified as criminal/prohibitory, California possesses jurisdiction under Pub.L. 83-280, § 2, 18 U.S.C. § 1162 (1988) and may enforce the fireworks law. Quechan Indian Tribe v. McMullen, (9th Cir., 1992) 984 F.2d 304.

- And, such officials likely would have been aware of this Court's earlier holding in California v. Cabazon Band of Mission Indians, (1987) 480 U.S. 202, in which, while disallowing state enforcement of regulatory statutes governing gaming, reaffirmed the principal that Public Law 280 states, such as

California, do have enforcement power on tribal lands and as to tribal members insofar as concerns state criminal statutes.

In the face of such knowledge, circumstances, and prior decisional law, it cannot be fairly stated that a reasonable official in this situation would have known that his conduct violated a clearly established and particularized constitutional right of a tribe and/or tribal official to be at liberty to refuse compliance with a duly authorized order of the state court magistrate. Therefore, for these reasons, and based on established law, on in support of Petitioners County of Inyo, et at, and speaking on behalf of all 58 California sheriffs, any one of whom or their respective staffs with find themselves similarly situated, these amici urge this Court to set aside the decision of the Court of Appeals and direct that the individually named Petitioners be granted qualified immunity.

CONCLUSION

For these reasons, as well as those expressed by Petitioner and such other amici as the Court has elected to hear on behalf of Petitioner, together with such oral argument as the Court may be pleased to entertain, Amici California State Sheriffs Association respectfully urge the Court to set aside the ruling of the Ninth Circuit Court of Appeals and order judgment in favor of Petitioner, or, at the least, find that the individually named Petitioners are entitled to the defense of qualified immunity.

Respectfully submitted,

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FOR ARGUMENT

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INYO COUNTY, *et al.*,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* FOR UNITED SOUTH AND EASTERN TRIBES, INC., IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. (USET) is a non-profit inter-tribal organization founded in 1968. USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands.[1] USET includes twenty-four federally recognized tribal governments from an area stretching from Maine to Texas.[2]

USET has a strong interest in the "immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 67 Fed. Reg. 46328. These immunities, privileges and powers include the "deeply rooted" freedom of tribal

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

[2] The members of USET are: the Eastern Band of Cherokees, the Mississippi Band of Choctaws, the Miccosukee Tribe, the Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, the Penobscot Indian Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Cayuga Nation. See 67 Fed. Reg. 46328 (July 12, 2002) (list of federally recognized tribes published pursuant to 25 U.S.C. § 479a-1).

governments from state jurisdiction. *Rice v. Olson*, 324 U.S. 786, 789 (1945). Inyo County's execution of a state search warrant for tribal records held in a tribal building on tribal land, in order to defeat the tribe's privacy policy, was an assertion of state jurisdiction over a tribal government without congressional authority. The assertion of state control over tribal governments undermines cooperation between tribal governments and state and local governments through compacts and other agreements that respect the sovereignty of both parties. It also interferes with the federal policy of strengthening tribal governments, including tribal law enforcement.

USET has a particular interest in the County's claim that the search was valid because it had "inherent jurisdiction" over a tribal government, a claim that echoes the one squarely rejected in *Worcester v. Georgia*, 31 U.S. 515 (1832). *Worcester* answered that claim with historical proof that states had no jurisdiction over Indian tribes on tribal lands before the Constitution, and did not acquire any under the Constitution. The early treaties and laws that defined the relationships between the state and federal governments and tribal governments consist, in large part, of the heritage of USET's members. USET's brief discusses the scope of state jurisdiction over tribal governments in light of that history and the decisions of this Court.[3]

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[3] The brief will not address the second and third questions presented in the County's petition.

STATEMENT

The Bishop Paiute Tribe (the Tribe) is a federally-recognized tribe that governs tribal land located in Southern California. (JA 99). The Tribe conducts gaming under a compact with the State.[4]

The Tribe reported quarterly payroll information to the California Economic Development Department pursuant to its compact.[5] (CA RE 320). California maintains a system to compare employers' reports to income reported by persons receiving public assistance. That system noted a discrepancy between the earnings reported by the Tribe and the earnings reported to welfare authorities by three members of the Tribe employed in the tribal casino over the period of April to June 1998. (CA RE 266). A report of the discrepancy was sent to the Inyo County Department of Health and Human Services, which then forwarded the matter to the County District Attorney for investigation. An investigator in the District Attorney's office requested records for the employees from the Tribe. The Tribe responded in writing on February 28, 2000, that its long-standing policy was to release such records only with the written consent of the employee. (JA 103, ¶ 17).

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[4] The Tribe's compact recites that "the State enters into this Compact out of respect for the sovereignty of the Tribe; * * * [and, among other things] to initiate a new era of tribal-state cooperation in areas of mutual concern." (JA 7). See also JA 102 (complaint ¶ 16). The compact was approved by the Secretary of the Interior on May 16, 2000. 65 Fed. Reg. 31189.

[5] Compact, § 10.3(b), JA 60.

Rather than seeking records from the tribal member employees directly, or obtaining their consent to disclosure by the Tribe,[6] the investigator sought and obtained a search warrant from the Superior Court. On March 23, 2000, the investigator, accompanied by sheriff's deputies, used bolt-cutters to enter a tribal storage building on tribal land, disregarding the protests of tribal officials that the search was unlawful. (JA 104). She seized tribal records containing information regarding the three tribal member employees named in the warrant, as well as many other tribal member employees not under investigation. (JA 149; CA RE 263-65 (search warrant return); JA 104).

Charges of wrongfully obtaining public assistance and medical care were later filed against the tribal member employees. On August 15, 2001 the prosecution dismissed the charges for lack of probable cause. Motion to Dismiss, *People v. Dewey*, Case No. MBCRF01-0027942-002/3 (Aug. 15, 2001).

In July 2000, the District Attorney sought more personnel records from the Tribe. (JA 104). The Tribe, through its attorney, agreed to release the records if the County provided a redacted copy of the tribal member employees' county welfare applications, which included authorization to disclose employment records. The County declined to request the records in a manner consistent with the Tribe's requirement of written consent.

On August 4, 2000, the Tribe filed suit in federal court. (JA 96-119). The District Court dismissed the complaint on November 22, 2000. (JA 120-141). The Court

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[6] See Cal. Welf. & Inst. Code § 11004(a) (recipient is responsible for reporting facts material to correct determination of eligibility and grant).

of Appeals for the Ninth Circuit reversed in an amended opinion issued on May 20, 2002. (JA 145-179). This Court granted *certiorari* on December 2, 2002. (JA 180).

SUMMARY OF ARGUMENT

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 345 U.S. at 789. The County's forcible search of tribal government offices on tribal lands and its seizure of tribal records violated the Tribe's federally-protected rights to govern itself and to be free from unreasonable searches and seizures. State court warrants could not authorize the search and seizure of tribal government records from a tribal government building on tribal land because states do not have jurisdiction over tribal governments.

In this Court, the County has abandoned its reliance on Public Law 280, which gives some states jurisdiction to prosecute crimes by individual tribal members on some tribal lands, but does not confer any jurisdiction over tribal governments. It now claims it has "inherent jurisdiction" over the tribal government, derived from state sovereignty over all land within its borders, including Indian lands.

Our brief presents historical evidence that the colonies, and later the states, did not exercise inherent jurisdiction to enforce their laws on tribal lands. The Court considered and rejected the argument that the states had inherent jurisdiction over Indian lands in *Worcester v. Georgia*, 31 U.S. 515 (1832). Chief Justice Marshall's opinion in *Worcester* was based on the history of relations between colonial, and later state and national governments with Indian tribes before and after the adoption of the Constitution. Although the tribes surrendered aspects of their

sovereignty to the federal government, becoming "domestic dependent nations," they retained the power of internal self-government and were not subject to state laws. The states could not retain jurisdiction under the Constitution, because they did not have it earlier. Indeed, the Constitution recognized that tribal Indians were outside the jurisdiction of the states, exempting "Indians not taxed," from the apportionment of electors and direct taxes. The Fourteenth Amendment retained that exemption, affirming the sovereignty of Indian tribes over their internal affairs.

The historical record also refutes the particular claim that states had jurisdiction to enter tribal lands at will to enforce their criminal laws. National and state treaties before the Constitution included provisions that are inconsistent with an inherent state power to enter tribal lands to enforce state laws, even for off-reservation crimes. After the Constitution, Congress exercised its power under the Indian Commerce Clause to provide for *federal* law enforcement on tribal lands, and to require tribes to deliver tribal members to *federal* authorities when they were sought for off-reservation crimes. Congress could not and would not have done so, if states themselves had jurisdiction over tribal lands.

Statements in the Court's recent decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), regarding "inherent" state jurisdiction on tribal lands do not control this case, which involves the search of a tribal government, not an individual member of a tribe, as in *Hicks*. The policy arguments offered by the County and its *amici* are without merit and should, in any event, be presented to Congress rather than to the Court.

ARGUMENT

STATES DO NOT HAVE JURISDICTION TO SEIZE TRIBAL RECORDS FROM TRIBAL GOVERNMENTS ON TRIBAL LANDS.

The execution of a search warrant by County officers for tribal records in a tribal government building on tribal land is an exercise of dominion and control over the Tribe. The Tribe adopted a general policy that it would not disclose personnel records without the employees' consent. That was an exercise of "the right of Indians to govern themselves," *Williams v. Lee*, 358 U.S. 217, 223 (1959), on their own land, not a regulation of non-Indians.

The search for and seizure of tribal records by means of a state court warrant infringes on tribal self-government in several ways. *First*, it directly overrides a tribal government decision to protect personnel records, which are tribal property. *Second*, it imposes the burdens of producing records and disrupting government activities on the Tribe. *Third*, it poses the risk of abuse for the purpose of harming the Tribe. "The power to tax is the power to destroy," *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 258 (1992) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)); so is the power to intrude into a government's office and to seize its property. Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 187 (1988) (quoting *McCulloch* in the context of state regulation); *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). Bolt cutters wielded by armed officers are no less a threat to sovereignty than taxes.

The County attempts to recast this case as tribal regulation of non-members in the image of *Nevada v. Hicks*, 533 U.S. 353 (2001). See Pet. Br. 28-30, Calif. Br. 11-18. A

lawsuit in federal district court asserting the Tribe's federal law right not to be searched is not tribal "regulation" of the County, any more than a private individual who sues to vindicate federal rights is thereby regulating the state. *Hicks* involved tribal court jurisdiction over state officers; it did not call into question the Tribe's ability to seek redress in federal court. *Id.* at 373 ("the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts * * * to vindicate constitutional or other federal- and state- law rights.").[7]

The County no longer claims that a federal statute gave it the power to search tribal records in the possession of the tribal government on tribal land. Indeed, the County and its *amicus*, the State of California, abandon reliance on Public Law 280, 18 U.S.C. § 1162, which confers criminal jurisdiction over state offenses committed by tribal members within certain reservations, but has never been construed to apply to tribal governments. See Pet. Br. 25, n.11 ("Public Law 280 does not apply in this case; citing *Hicks*, 533 U.S. at 365); Calif. Br. 17 n.6 ("Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime.").[8] Instead, the County and its state *amici* invoke "inherent jurisdiction" as the basis for the

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7 This Court has not treated tribal challenges to the exercise of state power over them as subject to analysis under *Montana v. United States*, 450 U.S. 544 (1981). See, e.g., *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

8 To the contrary, in the context of civil regulation this Court has explicitly recognized that Public Law 280 is inapplicable to tribal governments. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976). Cf. *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172 (1977) (state court lacked jurisdiction over tribe, although it had jurisdiction over tribal members).

search, relying on language in *Hicks*. (Pet. Br. 31; Calif. Br. 11).

The discussion of "inherent" state jurisdiction in *Hicks* does not control this case. That discussion was not essential to the Court's holding that tribal courts cannot adjudicate federal claims against state officers.[9] Moreover, *Hicks* involved a search of private property in an individual residence on individual trust land, not the search of tribal records in a tribal government building on tribal land. The assertion of state jurisdiction over a tribal government presents very different considerations from the assertion of state jurisdiction over individual members of a tribe who violate state law. Congress has never conferred state jurisdiction over tribal governments.

As we demonstrate more fully below, states do not have "inherent jurisdiction" over tribal governments. The states did not have such power before the Constitution was adopted, and, therefore, could not reserve it. The Constitution did not confer any new state jurisdiction over Indian tribes, which retained the right of self-government, subject to federal

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9 "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). See also *BE & K Const. Co. v. NLRB*, 122 S. Ct. 2390, 2397 (2002). As Justice Souter's concurring opinion in *Hicks* shows, a determination whether the state officers had actual authority to enter tribal lands to execute a state search warrant was unnecessary to decide the question presented, which concerned the *tribe's* authority to regulate the conduct of state officers through its courts. See 533 U.S. at 375 ("while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, I would go right to *Montana's* rule that a tribe's civil jurisdiction generally stops short of nonmember defendants," subject to two inapplicable exceptions.).

authority through the Indian Commerce Clause and the Treaty Clause.

A. States Do Not Have "Inherent Jurisdiction" Over Tribal Governments in Indian Country.

This Court has never held that states have inherent jurisdiction over tribal governments on tribal lands.[10] To do so now would overturn more than two centuries of federal Indian law based on the understanding that tribes are sovereigns subordinate to the authority of Congress, but not subordinate to the states. See, e.g., *Rice v. Olson*, 324 U.S. at 789; *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980) ("tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States."). "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. at 219.[11] Indeed, Public Law 280, the federal statute on which the County relied in the courts below as a source of its power on the Tribe's land, would have been superfluous if state jurisdiction over tribal land arising from the states' pre-constitutional sovereignty, as the County now claims. Pet. Br. 31.

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[10] In *Hicks*, the state officers entered the reservation to execute the warrant with the consent and cooperation of the tribe. 533 U.S. at 397 (O'Connor, J., concurring in the judgment).

[11] For example, the tribal termination acts of the 1950s made tribes subject to state laws upon termination, reflecting the assumption that tribes are not otherwise subject to state laws. See, e.g., *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498, 508-09 (1986).

1. The original understanding of state, federal and tribal relations is set forth in *Worcester v. Georgia*, 31 U.S. 515 (1832). See also *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965) ("from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves free from state interference."). In *Worcester*, the Court squarely confronted a state's claim to inherent jurisdiction over a tribal government and its land.[12] Frustrated with the Cherokee Nation's refusal to cede more of its land through a federal treaty, Georgia enacted laws intended to coerce the tribe's removal to the West by asserting direct state control over its territory.[13] See 31 U.S. 521-28 (reproducing laws including § 6 of the act of Dec. 19, 1829, authorizing service of state process on tribal land.). Georgia prosecuted Samuel Worcester, a missionary from Vermont, and sentenced him to four years at hard labor for violating one of those laws

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[12] The Court previously avoided deciding this politically contentious issue when it dismissed the Cherokee Nation's suit to invalidate the Georgia laws on jurisdictional grounds. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (Court has no original jurisdiction over suit between tribe and state because a tribe is a "domestic dependent nation," not a foreign state within the meaning of Article III). See Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics and Morality, 21 Stan. L. Rev. 500 (1969) (discussing background); Stephen Breyer, The Cherokee Indians and the Supreme Court, 25 J. Sup. Ct. Hist. 215 (2000).

[13] In 1802, Georgia became the last State to surrender its Western land claims in favor of the United States. In return, the federal government agreed to seek land cessions from the tribes within Georgia's borders. Laws of the Colonial and State Governments Relating to Indians and Indian Affairs from 1633 to 1831, Inclusive, 188-191 (1979 reprint). Congress ordered the compilation of colonial and state laws relating to Indian tribes in 1832 in response to the controversy over Georgia's imposition of its laws on the Cherokees. *Id.* at iv.

requiring non-Indians residing on the Cherokee reservation to obtain a state license.

The Court first addressed the contention that Georgia had territorial sovereignty over the Cherokee reservation. See *id.* at 596 (Baldwin, J., affirming the views expressed in his opinion in *Cherokee Nation v. Georgia*, 30 U.S. at 41-43). Chief Justice Marshall's opinion demonstrated that Georgia did not acquire sovereign jurisdiction over the Cherokee Nation as the successor to the British Crown, which treated the Indian tribes as "nations capable of * * * governing themselves under her protection." *Id.* at 548-49, 560 (the King could cede only what belonged to the Crown). Nor, as the Chief Justice explained, did Georgia acquire any power over tribes or tribal lands through the Constitution nor through national treaties, which placed the Cherokees under the protection of the national government.

The Court held that Georgia had no authority to extend its laws to the Cherokee reservation. 31 U.S. at 560. The Chief Justice recognized, however, that Georgia's lack of authority to apply its law to tribal land was insufficient to issue a writ of error. *Id.* at 561 (the Court would have no power to grant relief if the objection to the law "was confined to its extra-territorial operation"). He therefore went on to show that the state's laws were also "repugnant to the constitution, laws, and treaties of the United States," including the treaties with the Cherokees. *Id.* [14]

[14] The *Worcester* Court's rejection of inherent state jurisdiction over the Indian tribal land was therefore not limited to land protected by treaties expressly exempting the lands from state control. Contra *Hicks*, 533 U.S. 361 n.4.

"Despite the bitter criticism and defiance of Georgia which refused to obey this Court's mandate in *Worcester*, the broad principles of that decision came to be accepted as law." *Williams v. Lee*, 358 U.S. at 219. The Court has adhered to the "basic policy" of *Worcester*, although, "[o]ver the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Id.*[15]

2. *Worcester* is solidly grounded in history. Under the British Crown, tribes exercised self-government within their own territories and entered into treaties with colonial authorities as sovereigns.[16] In the Proclamation of 1763, the Crown stripped the individual colonies of power to enter into treaties with Indian nations, centralizing responsibility in two superintendents. At the same time, the Crown pursued a policy of separation, establishing definite borders between the land controlled by the colonial

[15] The Court has recently "shift[ed] its approach" towards federal preemption rather than relying solely on tribal sovereignty. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 n.9 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). The cases in which the Court has done so, however, involved balancing the three sovereigns' interests in regulating the on-reservation activities of non-Indians. The Court has never "balanced" state jurisdiction over the tribe itself. Moreover, the Court continues to acknowledge the tribes' "right of internal self-government." *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[16] The colonies relied on the tribes to turn over offenders. See, e.g. Laws of the Colonial and State Governments Relating to Indians and Indian Affairs from 1633 to 1831, Inclusive, 37, 40 (Connecticut 1672). Colonial governments extended their authority over Indians only after some tribes ceased to govern their land and their members. See *Worcester*, 31 U.S. at 580 (M'Lean, J.) (Massachusetts, Connecticut and Rhode Island and others extended state laws over remnants of tribes that had lost the power of self-government).

governments and available for settlement on the one hand and tribal lands on the other. See Robert N. Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs, 69 B.U. L. Rev. 329 (1989).

After Independence, the state and national governments contested responsibility for Indian affairs. The Articles of Confederation left room for debate over whether the states, or only the national government, could enter into treaties with the Indian nations to acquire land. The states claimed the authority to enter into such treaties as the successors to the right of preemption, which was an exclusive right to buy land from the tribes for resale to non-Indians. Most importantly for present purposes, neither the states nor the national government claimed inherent jurisdiction to enforce their criminal laws *within* the territory occupied by the tribes.

Punishments of crimes in Indian country were governed by treaty, not by domestic state law. The new nation's first treaty was with the Delaware. Article IV of that treaty provided that neither the United States nor the tribe would punish "citizens of the other" except by a joint trial "by judges or juries of both parties." Treaty with the Delawares, 7 Stat. 13 (Sept. 17, 1778) (App. 56a); see also Treaty with the Cherokee, art. 4th (July 22, 1779), *reprinted in* 1 Documents in American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1980), pp. 79-81. After the Revolutionary War ended, national treaties specifically required the tribes to deliver members who committed crimes against non-Indians

to the national government for punishment.[17] Before the Constitution became effective, states also entered into similar treaties with tribes.[18] Those treaties did not assert inherent

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17 See, e.g., Treaty with the Wyandot, 7 Stat. 16, art. IX (Jan. 21, 1785); Treaty with the Cherokee, 7 Stat. 18, arts. VI and VII (Nov. 28, 1785); Treaty with the Choctaw, 7 Stat. 21, arts. V and VI (Jan. 3, 1786); Treaty with the Chickasaw, 7 Stat. 24, arts. V and VI (Jan. 10, 1786); Treaty with the Shawnee, 7 Stat. 26 , art. III (Jan. 31, 1786); Treaty with the Wyandot, 7 Stat. 28, art. V (Jan. 9, 1789); Treaty with the Six Nations [Treaty of Ft. Harmar], 7 Stat. 33, separate art. (Jan. 9, 1789).

18 See 1 Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979 (Vine Deloria, Jr. & Raymond J. DeMallie, eds. 1980), e.g., Treaty between the St. John's and MicMac and Massachusetts, arts. 3rd & 4th (July 19, 1776) (mutual promises of tribe and state to make satisfaction to party injured by its citizens), pp. 68-69; Treaty between the Cherokee and Georgia and South Carolina, art. V (May 20, 1777) (Cherokees agree to apprehend and deliver Indians who murder whites on tribal land; State agrees to execute whites who murder Indians in the presence of the tribe), p. 72; Treaty between the Overhill Band of Cherokee and North Carolina, art. 4th (July 20, 1777) (Cherokees agree to execute tribal member who commits murder in the presence of justices of the peace; state agrees to try and execute whites who murder Indians), p.74; Treaty between the Overhill Band of Cherokee and Virginia, art. 4 (July 20, 1777) (same); Treaty between the Creek and Georgia, arts. IV and V (Nov. 12, 1785) (Creek agree to give notice to the governor of punishment to be inflicted on a member of the tribe who commits a capital crime against a white; State agrees to give tribe notice of punishment of white who commits a capital crime against an Indian), p. 87(App. 39-40a); Treaty Between the Creek and Georgia, arts. Fifth and Sixth (Nov. 3, 1786) (same) (App. 42a); Treaty of Ft. Schuyler, 1788, art. IV (Sept. 22, 1788) (Oneida Nation agrees to apprehend non-Indian intruders, felons and offenders at the Governor's request so they can be brought to justice), pp. 97-99 (App. 38a); Treaty between the Onondaga and New York, art. Sixth (Sept. 12, 1788) (same), pp. 94-95. The pre-constitutional state treaties, like federal treaties, were understood to be agreements with sovereign governments. See 2 Op. Atty. Gen. 110 (July 28, 1828) (Georgia is bound by its pre-constitutional treaties extinguishing its claims for property destroyed earlier; Creeks are an independent nation

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state sovereignty over tribal lands. See Robert N. Clinton, There is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L. Rev. 113, 119-120 (2002). This course of treaty-making is inconsistent with the claim that the states acquired sovereignty over tribes within their borders upon Independence.

3. The adoption of the Constitution did not confer any state jurisdiction over Indian tribes. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985)(citations omitted); see also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). The Framers of the Constitution were aware of, and sought to end the uncertainty about responsibility for Indian affairs under the Articles of Confederation. James Madison, The Federalist No. 42, 268-69 (Clinton Rossiter ed., 1961) (describing Articles as "obscure and contradictory"); see also 2 The Founders' Constitution 529 (P. Kurland & R. Lerner eds., 1987)(reprinting exchange of letters between James Madison and James Monroe); *Cherokee Nation v. Georgia*, 30 U.S. 1, 36 (1831) (opinion of Marshall, Ch. J.); 2 Joseph Story, Commentaries on the Constitution § 1094 at 550 (1833).

Tribal sovereignty and the freedom of Indian tribes from state jurisdiction are implicit in the structure of the Constitution. Cf. *Alden v. Maine*, 527 U.S. 706, 729 (1999)(state sovereign immunity is implicit in the structure of the Constitution). Article I, Section 8, Clause 3, the "Indian Commerce Clause," assigns to Congress the power to regulate

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Footnote cont'd

whose "territory is inviolable by any other sovereignty" and "governed solely by their own laws.").

commerce "with the Indian tribes." This language was simplified by the Committee of Style from commerce "with Indians, within the Limits of any State, not subject to the laws thereof." 2 The Founders' Constitution at 530 (reprinting excerpts from the records of the Constitutional Convention). The streamlined language reflected the understanding that tribal Indians were, by definition, governed by the law of the tribe, and not by state law. Kenneth W. Johnson, Sovereignty, Citizenship and the Indians, 15 Ariz. L. Rev. 973, 983 (1973); see also Clinton, No Federal Supremacy Clause, 34 Ariz. St. L. Rev. 130-32; Robert N. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1056, 1147-1164 (1995). Art. I, Section 2, Clause 3, excluded "Indians not taxed" from State populations for purposes of apportionment of the House of Representatives and direct taxes. That provision also recognized that tribal Indians were not subject to state laws. Handbook of Federal Indian Law 388 (1982 ed.). Art. I, Section 10, Clause 1 forbade the States to enter into treaties. Thus, when Georgia at last agreed to cede its Western land claims to the United States in 1802, it did so in exchange for a promise from the United States to "extinguish the Indian title" to lands within Georgia, because the state could no longer do so for itself. Laws of the Colonial and State Governments at 188, 190.

5. Beginning in the First Congress, the federal government exercised its power to regulate Indian affairs by statute as well as by treaty. See generally Francis P. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834, 188-212 (1962) (describing the history of criminal jurisdiction in Indian country). The first Indian Trade and Intercourse Act provided:

> That if any citizen or inhabitant of the United States or of the territorial districts of the United States, shall go into any town,

settlement or territory belonging to any nation or tribe of Indians, and there shall commit any crime upon, or trespass against, the person or property of any peaceable or friendly Indian or Indians, which, *if committed within the jurisdiction of any state*, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof. 1 Stat. 137, § 5 (July 22, 1790) (App. 2-3a) (emphasis added).

Section 6 of the Act assigned jurisdiction of offenses by non-Indians on tribal lands to the federal courts under the procedures established in the First Judiciary Act. The plain language of the Act acknowledges that the states did *not* have jurisdiction over tribal lands, and that the federal government, not the state governments, had responsibility for law enforcement, just as it did within federal enclaves. See Prucha, American Indian Policy at 190.[12]

When Congress renewed the Indian Trade and Intercourse Act in 1793, it included federal authority to prosecute non-Indians for crimes against Indians within "any town, settlement or territory belonging to any nation or tribe

[12] As this Court expressly recognized in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), the Indian Trade and Intercourse Acts applied to Indian lands within the existing states, as well as to federal lands organized as territories.

of Indians" which would be punishable under the law of the state or territory if committed "within the jurisdiction of any state, or within the jurisdiction of either of such [territorial] districts." 1 Stat. 330, §§ 4, 10 (March 1, 1793) (App. 5a, 7a). In addition, Congress added a new section authorizing the President (within the existing states), or the territorial governors (within the territories) to cause non-Indians subject to prosecution under the Act for crimes "within any town, settlement or territory belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States or of the said [territorial] districts." (App. 8a) That special rendition provision confirms that state criminal jurisdiction did not extend to land "belonging to any nation or tribe of Indians." See also *id.*, § 13 (differentiating trade with "Indians living on land surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states" from trade with tribal Indians, who were not) (App. 9a).

The 1796 renewal of the Act responded to criticisms of the previous versions for extending federal law to crimes against Indians, but not to crimes by them. See Prucha, American Indian Policy, at 192; 5 Annals of Congress at 902 (April 9, 1796). The Act established a procedure for non-Indians to seek redress if "any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States" and commit crimes there. *Id.* § 14. (App. 15-16a). The injured party was required to apply to federal officials, who would in turn seek satisfaction from the tribe. The federal government promised to indemnify the injured party as long as the injured party refrained from "crossing over the line on any of the Indian

lands."[20] See Prucha, American Indian Policy at 194-98 (describing operation in practice).[21] That authority would have been superfluous at best and a serious encroachment on state sovereignty at worst, if states had had jurisdiction to enter tribal lands to enforce the law themselves.[22]

Congress did not extend federal power to crimes by Indians *inside* Indian country until 1817. 3 Stat. 383; Prucha, American Indian Policy at 193.[23] That provision was amended in the final Indian Trade and Intercourse Act of

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[20] Section 14 did not limit the power to arrest Indians if found outside Indian lands.

[21] Section 19 of the 1834 Act made it the duty of federal Indian superintendents and agents to arrest "all Indians accused of committing any crime, offence or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory and have fled into the Indian country" either by demanding the tribe to produce them or "by such other means as the President may authorize." (App. 26a). See S. Rep. No. 20-72, at 43 (1829) (Secretary of War's submission explaining need to authorize federal officials to aid in the apprehension of Indians sought for off-reservation crimes).

[22] The relevant provisions were re-enacted in 1799 and as permanent legislation in 1802. Prucha, American Indian Policy at 192. 1 Stat. 743; 2 Stat. 139.

[23] Justice McLean, as Circuit Justice, reported that the 1817 statute was passed in response to an 1816 decision dismissing an indictment of two Indians for killing a non-Indian on a public road within the Cherokee reservation. *United States v. Bailey*, 24 F. Cas. 937 (C.C.D. Tenn. 1834). In *Bailey*, Justice McLean ruled that the Indian commerce clause did not authorize Congress to apply federal law to crimes by non-Indians against non-Indians committed on Indian lands. 24 F. Cas. at 940.

1834, 4 Stat. 729, and is now codified at 18 U.S.C. § 1152.[24] (App. 28a).

6. The Fourteenth Amendment reaffirmed the constitutional status of tribal governments, again excluding "Indians not taxed," from the apportionment of electors and direct taxes. In 1870, the Senate Committee on the Judiciary issued a report on the effect of the Fourteenth Amendment on the citizenship of tribal Indians. S. Rep. 41-268, at 9-10 (1870). After surveying the history of federal Indian law, the Committee opined that the Fourteenth Amendment did not extend citizenship to members of the Indian tribes, because they were not "subject to the jurisdiction" of the United States:

> In the opinion of your committee, the Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution. The Government has asserted a political supremacy over the Indians, and the treaties and laws quoted from present these tribes as "domestic dependent nations," separated from

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[24] Congress exempted crimes by Indians against Indians. § 25. The House report regarding the 1834 Act explained that crimes by Indians against Indians had been covered by the 1817 Act, which applied "to all persons in the Indian country, without exception," but "it is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, at any place within their own limits." H.R. Rep. No. 23-474, at 13 (1834).

> the States of the Union within whose limits they are located, and exempt from the operation of State laws; and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or states.

There is no room within this framework for inherent state jurisdiction over an Indian tribal government on tribal land.

7. This Court's decisions of the immediate post-Civil War era reflect the same understanding. In *The Kansas Indians*, 72 U.S. 737, 754 (1867), the Court held that members of three Indian tribes were not subject to state taxes. That decision rested on the general rule that states lacked jurisdiction over tribal lands, not on a specific prohibition in a federal treaty. Although one of the tribes had a treaty promising that its land would remain outside state jurisdiction, (Treaty with the Shawnee, 10 Stat. 1053 (May 10, 1854)), the other two tribes did not have such a guarantee. See *id.* at 759 (rejecting distinction between the Shawnee and the Wea based on Treaty with the Kaskaskia, 10 Stat. 1082 (May 30, 1854)); *id.* at 760 (same as to Miami tribe based on Treaty with the Miami, 10 Stat. 1093 (June 5, 1854)). Similarly, in *The New York Indians*, 72 U.S. 761 (1867), the Court held that Seneca reservation land was exempt from state taxation because the tribe had not yet relinquished jurisdiction, even though the specific parcels had been sold to non-Indians and the federal government had approved the eventual transfer of the reservation. In a related case involving the same 1838 federal treaty, the Court also held that the *State* had no authority to remove Seneca Indians from land that had been ceded in the treaty, and that removal was the sole responsibility of the federal government. *Fellows v.*

Blacksmith, 60 U.S. 366 (1856). The Senecas' treaty reserved the land for the Senecas' "free use and enjoyment."[25] Thus, the holdings in *The New York Indians* and *Fellows v. Blacksmith* cannot have been based on an express guarantee that "their lands would never be subjected to the jurisdiction of any State or Territory." Cf. *Hicks*, 533 U.S. at 362 n.4.

8. The sole authority directly cited by the County and its state *amicus* for the contrary proposition that states have inherent jurisdiction over tribal governments and tribal lands is *Hicks*. It would be surprising that an "inherent" state power "mandated by the nature of American federalism" (Calif. Br. 18) made its first appearance in 2001. And, as we have shown, it is not true (as to Indian country) that "as sovereigns succeeding to Great Britain's territorial sovereignty, the States have had inherent authority to perform core governmental functions, like the investigation of crimes, throughout their territory from the time of the Constitution's framing." (Calif. Br. 19). The discussion of "inherent jurisdiction" in *Hicks* is not based on historical evidence contradicting Chief Justice Marshall's account of relations among colonial, then state and federal governments on the one hand, and Indian tribes on the other. Rather, it appears to be based on late nineteenth century cases that tie state jurisdiction over *non-Indians* to the language of the treaties that create particular Indian reservations. See also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), cited in *Hicks*, 533 U.S. at 362. A closer examination of those cases shows that they do not support fundamentally inverting

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[25] 7 Stat. 44, Art. III (Nov. 11, 1794). Article VII of the Treaty of Canandaigua did provide for the resolution of disputes arising from the "misconduct of individuals" between the tribal government and the federal government, recognizing the absence of state jurisdiction to enforce state laws on tribal land.

federal Indian law to allow states to exercise jurisdiction over tribal governments unless expressly forbidden by treaty.

The idea that state jurisdiction depends on the specific terms of a federal statute or treaty, rather than on the general tribal sovereignty principle proclaimed in *Worcester*, seems to have originated in *Langford v. Monteith*, 102 U.S. 145 (1880). *Langford* held that a *territorial* court had territorial jurisdiction over a suit to evict a tenant from Indian land, overruling *Harkness v. Hyde*, 98 U.S. 476 (1878) (process from a territorial court cannot be served on a defendant on an Indian reservation). Because *Langford* involved a territorial court exercising Congress' plenary powers over the territories, it provides no support for *state* jurisdiction, inherent or otherwise. But see *Organized Village of Kake*, 369 U.S. at 72 (citing *Langford* as support for the proposition that "a reservation was in many cases a part of the surrounding State or Territory.").[26] The same is true of *Utah*

[26] Justice Miller's opinion for the Court in *Langford* cites his opinion as Circuit Justice in *United States v. Ward*, 28 F. Cas. 397 (C.C.D. Kan. 1863), which holds that a non-Indian could not be tried in federal court for killing a non-Indian on an Indian reservation because it was not within the "exclusive" jurisdiction of the United States and was within the jurisdiction of the state of Kansas. The Circuit Court relied on the absence of an explicit promise in the treaty recognizing the tribe's reservation that it would remain outside the jurisdiction of the state. The full Court rejected this contention four years later in *The Kansas Indians*. Furthermore, the Indian Trade and Intercourse Act did not require federal jurisdiction to be exclusive. It created federal jurisdiction over Indian country on the *same basis* as federal jurisdiction over lands within the exclusive jurisdiction of the United States. Thus, the existence of state jurisdiction was arguably irrelevant to the availability of federal criminal jurisdiction under the Act. Cf. 25 U.S.C. § 233 (statute conferring concurrent jurisdiction on the state). *Ward* nevertheless "may have had an important influence" on the Court's later decision in *McBratney*. Handbook of Federal Indian Law 264 n.44 (1982 ed.).

& N. Ry. Co. v. Fisher, 116 U.S. 28 (1885), which held that the *territory* of Idaho had jurisdiction to tax land within the boundaries of an Indian reservation set aside by Congress for the railroad. But see *Hicks*, 533 U.S. at 362 (citing *Utah & N. Ry.* as support for the proposition that an Indian reservation is now ordinarily considered part of the territory of the state).[27]

A year after *Langford*, the Court decided *United States v. McBratney*, 104 U.S. 621 (1881). *McBratney* involved a murder by a non-Indian of a non-Indian on the Ute reservation in Colorado. The Court held that the state courts, not the federal district court, had jurisdiction to try the case. The Court read the statute admitting Colorado as a state as "necessarily repeal[ing]" the provisions of the federal treaty with the Utes precluding state jurisdiction, because Congress had expressly exempted Indian land from the state's jurisdiction when it wished to do so. *Id.* at 623. The Court was careful, however, to stress that its decision was not about the rights of tribal governments. *Id.* at 624.

The Court's focus in *McBratney* on federalism rather than tribal sovereignty was understandable. Congress had provided for federal jurisdiction over crimes by non-Indians on Indian reservations in 1817, but there were questions about whether Congress could legislate with respect to crimes that

[27] *Hicks* also cites the 1958 edition of the Handbook of Federal Indian Law 510 & n.1. The 1982 (and most current) edition of this treatise reads: "tribal lands within the boundaries of state or organized territories have always been considered to be *geographically* part of the respective state or territory. *This was so even when the state had no jurisdiction over the tribal lands.*" p. 649 (emphasis added; footnotes omitted). The authors of the 1982 edition caution against reliance on the 1958 edition, which was written at a time when the Department of the Interior was firmly committed to a policy of terminating tribal governments. Handbook of Federal Indian Law at *ix* (1982 ed.).

did not involve Indians under the Indian Commerce Clause. See n. 23, *supra*. This was unimportant in the territories, where Congress exercised legislative jurisdiction over crimes by non-Indians, but became important in the new states. Reading the act of admission as shifting that jurisdiction to the newly-admitted state when it would not affect tribal members or tribal self-government was an attractive solution. *McBratney's* reading of federal statutes and federal treaties may not be entirely convincing, but the decision clearly rests on federal law, not on inherent pre-constitutional jurisdiction over a tribal ~~government~~.[28]

Subsequently, in *Draper v. United States*, 164 U.S. 240 (1896), the Court held that the state courts of Montana rather than the federal courts also had jurisdiction over crimes involving non-Indians on the Crow reservation, notwithstanding a provision in the act of admission leaving Indian lands "under the absolute jurisdiction and control of the congress." The Court explained that, '[a]s equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise construed." *Id.* at 244-45. With that principle of construction in mind, the Court read the statutory reservation of federal jurisdiction as limited to preventing lands allotted to the Indians in severalty from falling under state law so as to impair federal restrictions on alienation, but not as barring state criminal jurisdiction over crimes involving non-Indians. In *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946), the Court

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[28] *McBratney* has been criticized as unclear and inconsistent with general principles of statutory construction. Handbook of Federal Indian Law 264-66 (1982 ed.) (doubting "that the same result would be reached today in a case of first impression). *McBratney* should, in any event, not be extended.

reasoned that because Colorado had been admitted on an "equal footing" with the original states, *McBratney* must imply that the original states also had jurisdiction to prosecute offenses involving only non-Indians on tribal lands.

McBratney, *Draper* and *Martin* do not recognize a broad "inherent" general state jurisdiction over tribal governments on Indian lands. None of the cases involve tribes or Indians. From the Court's perspective, it may have seemed of little importance to the tribe whether prosecutions of non-Indians for crimes against non-Indians took place in state or federal court, so long as no tribal interests were perceived to be at stake.

When the Court saw tribal interests at stake, it adhered to the rule forbidding state jurisdiction. In *United States v. Kagama*, 118 U.S. 375 (1886), the Court upheld the constitutionality of the Indian Major Crimes Act. *Kagama* involved the murder of one Indian by another Indian within the Hoopa Valley reservation in California. The Court acknowledged that murder is "in most all cases of its commission punishable by the laws of the states." *Id.* at 383. That could not be so of tribal Indians, however, who "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *Id.* The Court expressly reaffirmed *Worcester* as the rule applicable to state power over tribal Indians within reservation lands. *Id.* at 384. The common thread uniting *Kagama* to *Worcester* is that tribes have a government-to-government relationship with the federal government, and are not subordinate to the states. States therefore do not have jurisdiction when tribal interests are at stake. *Donnelly v. United States*, 228 U.S. 243, 271-72 (1913) (holding *McBratney* inapplicable to crimes by or against Indians); *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946) (Arizona may have jurisdiction over offenses between non-Indians, but not offenses by an

Indian against a non-Indian); *Williams v. Lee*, 358 U.S. 217, 219 (1959) (same). Those cases are inconsistent with the idea that states have the same jurisdiction over tribal lands as over non-tribal lands within their borders.[29]

B. *Hicks* Should Not Be Extended to Searches of Tribal Governments.

The County and its *amici* do not make a serious effort to identify an historical basis for an "inherent" state jurisdiction to execute search warrants for tribal government records in tribal government offices on tribal land. Nor could they. Instead, they extrapolate the rule they want from language in *Hicks*. Thus, they are arguing for a new judicially-constructed rule that is in conflict with the many decisions of this Court based on the general principle that states do not have sovereignty over tribes.

If the Court has common law power to change the relationship between state and tribal governments without legislation, it should only exercise it in accord with the federal Indian policies adopted by the political branches of

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[29] It is also incorrect to reason from state authority to serve process within federal enclaves that states must also have such authority within tribal lands. But see U.S. Br. 22. State authority to serve process in federal enclaves is based on an express reservation in the state's cession of land to the United States and the acceptance of those terms by the United States pursuant to Art. I, § 8, cl. 17. Absent such a reservation, a state would not have such power. See Joseph Story, Commentaries on the Constitution §§ 1219-20 (1833), *reprinted in* 3 The Founders' Constitution 237 (1987). Indian tribes do not enter into such agreements with states as a condition of occupying their lands.

government.[30] The policies of the allotment era reflected in *McBratney*, and the policies of the termination era reflected in *Martin*, have been discredited.[31] See *Moe v. Confederated Tribes*, 425 U.S. 463, 479 (1976) (allotment); Handbook of Federal Indian Law 180-88 (1982 ed.) (termination). Today, congressional Indian policy supports tribal sovereignty and stronger tribal institutions. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985) ("Our cases have recognized that Congress is committed to a policy of supporting tribal self-government and self-determination"); 25 U.S.C. §§ 450-450n (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 1901-1963 (Indian Child Welfare Act). The Court should not adopt by its judgment a rule of law that is at odds with that congressional policy.

Five years ago, this Court declined to reexamine the doctrine of tribal sovereign immunity, recognizing that Congress was free to do so if it chose, and that the Court should hesitate to act where Congress has refrained from acting within its sphere. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758-60 (1998). The same considerations should constrain the Court in this case. The County and its *amici* make policy arguments about the need to extend state jurisdiction throughout reservations. As the brief for the National Congress of American Indians shows, those public safety arguments are

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[30] This point is developed in Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over NonMembers, 109 Yale L. J. 1, 79 (1999).

[31] To say that the Court should not breathe new life into discredited policies is not to say that the Court does not apply the statutes Congress enacted during the allotment era. See *Brendale v. Confederated Tribes of the Yakima Nation*, 492 U.S. 408, 427 (1989) (opinion of White, J.).

unfounded. When Congress was faced with similar arguments for extending state sovereignty over tribal gaming, it declined to do so. S. Rep. No. 100-446, at 1-3, 5 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. Instead, Congress chose to respect tribal sovereignty and to permit states to regulate only within the framework of federal law by means of a compact negotiated with the tribe as a co-equal sovereign. The same respect for tribal sovereignty required the County to seek records from the Tribe by means consistent with the Tribe's policies and its right of self-government.

In this case, as in *Kiowa*, the Court should be reluctant to diminish tribal sovereignty because "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" through legislation. 523 U.S. at 759.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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INDIAN TRADE AND INTERCOURSE ACT OF 1790
1 Stat. 137

An Act to Regulate Trade and Intercourse With the Indian Tribes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians without such license as aforesaid. No license shall be granted for a longer term than two years. *Provided nevertheless*, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

Sec. 2. *And be it further enacted*, That the superintendent, or person issuing such license, shall have full power and

authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond: *Provided always*, That if it shall appear on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

SEC. 3. *And be it further enacted*, That every person who shall attempt to trade with the Indian tribes, or to be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

SEC. 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SEC. 5. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said

districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white in habitant thereof.

SEC. 6. *And be it further enacted*, That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offenses against the United States.

SEC. 7. *And be it further enacted*, That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

APPROVED, July 22, 1790.

INDIAN TRADE AND INTERCOURSE ACT OF 1793

1 Stat. 329

An Act to Regulate Trade and Intercourse with the Indian Tribes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that

purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

SEC. 2. *And be it further enacted*, That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

SEC. 3. *And be it further enacted*, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: *Provided*, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

SEC. 4. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

SEC. 5. *And be it further enacted*, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

SEC. 6. *And be it further enacted*, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided also*, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out

of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

SEC. 7. *And be it further enacted*, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

SEC. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with

any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or Commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

SEC. 9. *And be it further enacted*, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

SEC. 10. *And be it further enacted*, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offenses and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offenses and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective

districts, shall have, and are hereby invested with like power to hear and determine the same.

SEC. 11. *And be it further enacted*, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

SEC. 12. *And be it further enacted*, That all fines and forfeitures, which shall accrue under this act, shall be one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

SEC. 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

SEC. 14. *And be it further enacted*, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

SEC. 15. *And be it further enacted*, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.
APPROVED, March 1, 1793.

INDIAN TRADE AND INTERCOURSE ACT OF 1796
1 Stat. 469

An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence, thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash;

thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennesse rivers; thence easterly on the said ridge, to a point, from whence, a southwest line will strike the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch, thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which divides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; *Provided always*, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line hereinbefore recited.

SEC. 2. *And be it further enacted*, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

SEC. 3. *And be it further enacted*, That if any such citizen, or other person, shall go into any country, which is allotted, or secured by treaty as aforesaid to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person, as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

SEC. 4. *And be it further enacted*, That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and he imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value,

shall be paid out of the treasury of the United States: *Provided* nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

SEC. 5. *And be it further enacted*, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States, to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon: And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

SEC. 6. *And be it further enacted*, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

SEC. 7. *And be it further enacted*, That no such citizen, or other person, shall be permitted to reside at any of the towns,

or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond, with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit, such bonds as he may have taken, on the breach of any condition therein contained.

SEC. 8. *And be it further enacted*, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

SEC. 9. *And be it further enacted*, That if any such citizen, or other person, shall purchase, or receive of any Indian, in- the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

SEC. 10. *And be it further enacted*, That no such citizen or other person, shall be permitted to purchase any horse of an

Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

SEC. 11. *And be it further enacted*, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or

convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SEC. 13. *And be it further enacted*, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided*, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

SEC. 14. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney

or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always*, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: *And provided also* that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further*, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

SEC. 15. *And be it further enacted*, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for

trial, shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offenses and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offenses and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer, to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such district have in their ordinary sessions: And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district, in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

SEC. 16. *And be it further enacted*, That it shall be lawful for the military force of the United States, to apprehend every person, who shall, or may be found in the Indian country, over and beyond the said boundary line, between the United States

and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against, in due course of law: *Provided*, that no person, apprehended by military force, as aforesaid, shall be detained longer than ten days, after the arrest, and before removal.

SEC. 17. *And be it further enacted*, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

SEC. 18. *And be it further enacted*, That the amount of fines, and duration of imprisonment, directed by this act as a punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half to the use of the United States: Except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

SEC. 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary

jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

SEC. 20. *And be it further enacted*, That the President of the United States be, and he is hereby authorized, to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

SEC. 21. *And be it further enacted*, That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: *Provided, nevertheless*, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

SEC. 22. *And be it further enacted*, That this act shall be in force, for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

APPROVED May 19, 1796.

INDIAN TRADE AND INTERCOURSE ACT OF 1834

4 Stat. 729

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of

the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SEC. 2. *And be it further enacted*, That no person shall be permitted to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SEC. 3. *And be it further enacted*, That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his

bond decreed. But an appeal may be had from the agent or the superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SEC. 4. *And be it further enacted*, That any person other than an Indian who shall attempt to reside in the Indian country as a trade or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SEC. 5. *And be it further enacted*, That no license to trade with the Indians shall be granted to any persons except citizens of the United States: *Provided*, That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SEC. 6. *And be it further enacted*, That if a foreigner shall go into the Indian country without a passport from the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object the object of such person, the time he is allowed to remain, and the route he is to travel.

SEC. 7. *And be it further enacted*, That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge,

a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SEC. 8 *And be it further enacted,* That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SEC. 9. *And be it further enacted,* That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SEC. 10. *And be it further enacted,* That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SEC. 11. *And be it further enacted,* That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SEC. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

SEC. 13. *And be it further enacted,* That if any citizen or other person residing within the United States or the territory thereof, shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SEC. 14. *And be it further enacted,* That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SEC. 15. *And be it further enacted,* That if any citizen, or other person, residing or living among the Indians, or

elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SEC. 16. *And be it further enacted,* That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SEC. 17. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States,

such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also,* That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted, therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided,* That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

SEC. 18. *And be it further enacted,* That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding

sections of this act, and to administer an oath to the deponents.

SEC. 19. *And be it further enacted,* That it shall be the duty of the superintendents, agents. and sub-agents, to endeavour to procure the arrest and trial of all Indians accused of committing any crime, offence or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, or give, barter, or dispose of, any spirituous liquor or wine to an Indian, (in the Indian country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spirituous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to

the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SEC. 21. *And be it further enacted,* That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SEC. 22. *And be it further enacted,* That in all trials about the right of property in which an Indian may be a party on one side, and a white person or the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SEC. 23. *And be it further enacted,* That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the

introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SEC. 24. *And be it further enacted,* That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri: west, by the Mexican possessions; south, by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.

SEC. 25. *And be it further enacted,* That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SEC. 26. *And be it further enacted,* That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the

United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SEC. 27. *And be it further enacted,* That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SEC. 28. *And be it further enacted,* That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SEC. 29. *And be it further enacted,* That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians; and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April

sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen, an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (a) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four, the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however,* That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, no impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also,* That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SEC. 30. *And be it further enacted,* That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes as may be assigned to such acting superintendent, shall cease: *Provided,* That no additional compensation shall be allowed for such services.

APPROVED, June 30, 1834.

TREATY OF FORT PITT (PENNSYLVANIA) WITH THE DELAWARE NATION

7 Stat. 13.

Articles of agreement and confederation, made and entered into by Andrew and Thomas Lewis, Esquires, Commissioners for, and in Behalf of the United States of North-America of the one Part, and Capt. White Eyes, Capt. John Kill Buck, Junior, and Capt. Pipe, Deputies and Chief Men of the Delaware Nation of the other Part.

ARTICLE 1. That all offenses or acts of hostilities by one, or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

ARTICLE 2. That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations: and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities,

till their enemies are brought to reasonable terms of accommodation: and that if either of them shall discover any hostile designs forming against the other, they shall give the earliest notice thereof, that timeous measures may be taken to prevent their ill effect.

ARTICLE 3. And whereas the United States are engaged in a just and necessary war, in defense and support of life, liberty and independence, against the King of England and his adherents, and as said King is yet possessed of several posts and forts on the lakes and other places, the reduction of which is of great importance to the peace and security of the contracting parties, and as the most practicable way for the troops of the United States to some of the posts and forts is by passing through the country of the Delaware nation, the aforesaid deputies, on behalf of themselves and their nation, do hereby stipulate and agree to give a free passage through their country to the troops aforesaid, and the same to conduct by the nearest and best ways to the posts, forts or towns of the enemies of the United States, affording to said troops such supplies of corn, meat, horses, or whatever may be in their power for the accommodation of such troops, on the commanding officers, &c. paying, or engaging to pay, the full value of whatever they can supply them with.

And the said deputies, on the behalf of their nation, engage to join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare, consistent with their own safety, and act in concert with them; and for the better security of the old men, women and children of the aforesaid nation, whilst their warriors are engaged against the common enemy, it is agreed on the part of the United States, that a fort of sufficient strength and capacity be built at the expense of the said States, with such assistance as it may be in the power of the said Delaware Nation to give, in the most convenient place, and advantageous situation, as shall be agreed on by the commanding officer of the troops aforesaid, with the advice

and concurrence of the deputies of the aforesaid Delaware Nation, which fort shall be garrisoned by such a number of the troops of the United States, as the commanding officer can spare for the present, and hereafter by such numbers, as the wise men of the United States in council, shall think most conducive to the common good.

ARTICLE 4. For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking.

And it is further agreed between the parties aforesaid, that neither shall entertain or give countenance to the enemies of the other, or protect in their respective states, criminal fugitives, servants or slaves, but the same to apprehend, and secure and deliver to the State or States, to which such enemies, criminals, servants or slaves respectively belong.

ARTICLE 5. Whereas the confederation entered into by the Delaware nation and the United States, renders the first dependent on the latter for all the articles of clothing, utensils and implements of war, and it is judged not only reasonable, but indispensably necessary, that the aforesaid Nation be supplied with such articles from time to time, as far as the United States may have it in their power, by a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate salary, one more influenced by the love of his country, and a constant attention to the duties of his

department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument: Convinced of the necessity of such measures, the Commissioners of the United States, at the earnest solicitation of the deputies aforesaid, have engaged in behalf of the United States, that such a trade shall be afforded said nation, conducted on such principles of mutual interest as the wisdom of the United States in Congress assembled shall think most conducive to adopt for their mutual convenience.

ARTICLE 6. Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into. And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress. And it is also the intent and meaning of this article, that no protection or countenance shall be afforded to any who are at present our enemies, by which they might escape the punishment they deserve.

In witness whereof, the parties have hereunto interchangeably set their hands and seals, at Fort Pitt, September seventeenth, anno Domini one thousand seven hundred and seventy-eight.

TREATY OF FT. SCHUYLER
September 22, 1788

At a treaty held at Fort Schuyler, formerly called Fort Stanwix in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas - it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, Of the said ceded lands the following tract, to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the Said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner 6 ' of the last mentioned tract; thence due south until it intersects a due west line from the bead of the Tianaderha or Unadilla River; thence from the said point of intercessio.n due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek, the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their

own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their right so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lauds along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indiana (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy

their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly, In consideration of the Said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist milt and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever, on the first day of June in every year at Fort Schuyler aforesaid, six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollar's shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas, the people of the State of New York shall grant to the Said John Francis Perache a tract of land, Beginning in the line of property at it certain cedar tree near the road leading to Oneida, and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache bath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George IV. Kirkland, being now appropriated to the use of the

Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation; and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or on any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said state for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony whereof, as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

TREATY BETWEEN THE CREEK AND GEORGIA
November 12, 1785

Articles of a treaty concluded at Galphinton on the 12th day of November one thousand seven hundred and eighty-five, between the underwritten commissioners, in behalf of the State of Georgia of the one part, and the kings, head men and warriors in behalf of themselves, and all the Indians in the Creek nation of the other, on the following conditions:

ARTICLE 1.

The said Indians for themselves and all the tribes or towns within their respective nations, within the limits of the State of Georgia, have been and now are members of the same, since the day and date of the constitution of the said State of Georgia.

II. If any citizen of this State or other person or persons shall attempt to settle or run any of the lands reserved to the Indians for their hunting grounds, such person or persons may be detained until the governor shall demand him or them, and then it should be lawful for any of the tribes near such offenders to come and see the punishment, according to such laws as now are or hereafter shall be enacted by the said State for trying such offenses.

III. It shall in no case be understood, that the punishment of the innocent, under the idea of retaliation shall be practised on either side.

IV. If any citizen of this State or other white person or persons shall commit a robbery or murder or other capital crime on any Indian, such offenders shall be delivered up to justice, and shall be tried according to the laws of the State, and due notice of such intended punishment shall be sent to some one of the tribes.

V. If any Indian shall commit a robbery or murder or other capital crime on any white person, such offenders shall receive a punishment adequate to such offence, and due notice of such intended punishment shall be given to his honour the governor.

VI. In case of any design being formed in any neighbouring tribes, against the peace or safety of the State, which they shall know or suspect, they shall make known the fame to his honor the governor.

VII. All white person or persons shall be at liberty and conducted in safety into the settled parts of the State when they shall require it, except such persons as shall come under the restrictions pointed out in the second article.

VIII. The said Indians shall restore all the negroes, horses or other property that are or may be among them, belonging to any citizen of this State or any other person or persons whatever, to such person as the governor shall direct.

IX. That the trade with the said Indians shall be carried on as theretofore.

X. All horses belonging to any Indian that shall be found in the said State, such horses shall be restored to such person as the head men of the tribe where such Indian may reside shall direct.

XI. The present temporary line reserved to the Indians for their hunting ground, shall be agreeable to the treaty held at Augusta in the year one thousand seven hundred and eighty-three; and that a new temporary line shall begin at the forks of the Oconee and Okmulgee rivers, thence in a south-west direction, until it shall intersect the most southern part of the stream called St. Mary's river, including all the islands and waters if the said stream, thence down the said river to the old line. And all the ground without the said new temporary lines when run and completed shall be reserved to the Indians for their hunting grounds as aforesaid.

IN WITNESS where the parties have hereunto affixed their hands and seals the day and year before written.

TREATY BETWEEN THE CREEK AND GEORGIA
November 3, 1786

Articles of a Treaty of peace, amity, and commerce, concluded near the mouth of Shoulder-bone Creek, a branch of the Oconee River the third day of November, in the year of our Lord one thousand seven hundred and eighty-six, and of the Independence of the United States of America the eleventh, between the subscribing Commissioners in behalf of the State of Georgia of the one part, and the underwritten Kings, head men, and Warriors, in behalf of the Creek Nation on the other, on the following conditions, namely.

WHEREAS since the signing of the last treaty held at Galphinton and dated the twelfth day of November one thousand seven hundred and eighty-five, between commissioners appointed by the said State, and the kings, head men and warriors of the said Creek nation, acts of hostility have been committed by parties of the Indians on the inhabitants of the said State, in violation of the said treaty, whereby the friendship and harmony so essentially necessary to both parties have been greatly disturbed. AND WHEREAS the said parties are now mutually desirous of renewing a treaty, which may comprehend such articles as will give satisfaction to the party injured, and restore peace, friendship, and commerce to both. It is therefore covenanted and agreed.

First, The Indians for themselves and the rest of the kings, head men and warriors of the Creek nation, do promise and engage that six of their people who were of the parties that murdered the same number (say six) of the white inhabitants last spring shall be put to death in a manner

satisfactory to the person or persons whom his honor the governor or the commissioners may send to see it done. And that the white people who were the means of the said murders being committed shall be removed from the nation without delay.

Second, All negroes, horses, cattle and other property now in the nation, and which were taken from the inhabitants of Georgia, shall be restored to such person or persons as his honor the governor or the commissioners shall direct. All white or other free people in the nation who are held as prisoners or slaves shall also be delivered up to the aforesaid persons.

Third, If any citizen of this State or other person or persons shall attempt to settle or run any of the lands reserved for the Indians for their hunting grounds, such person or persons may be detained until the governor shall be informed thereof and demand him or them, and then any of the tribes near such offenders to come and see the punishment according to such laws as now are or hereafter may be enacted by the said State for trying such offenders.

Fourth, The punishing of innocent persons under the idea of retaliation shall not be practised on either side.

Fifth, If any citizen of the State, or other white person or persons shall commit a robbery or murder or other capital crime on an Indian, such offender shall be delivered up to justice, and be tried according to the laws of the State, and due notice of such intended punishment shall be sent to some one of the tribes.

Sixth, If any Indian shall commit a robbery or murder or other capital crime on any white person, such offender shall receive a punishment adequate to the offence, and due notice of such intended punishment shall be given to his honor the governor.

Seventh, If the Indians shall know or suspect of any design or any neighbouring tribes against the peace or safety

of this State, they shall make the same known in the most expeditious manner to his honor the governor.

Eighth, All white persons shall be at liberty and conducted in safety into the settled parties of the State, when they shall require it, except such persons as shall come under the restrictions pointed out in the third article.

Ninth, The trade with the Indians shall be carried on as heretofore. And all just debts due by any of the said Indians to any of the merchants or traders of the said State shall be fairly and fully paid.

Tenth, The present temporary lines reserved to the Indians for their hunting grounds, shall be agreeable to the treaties held at Augusta and Galphinton the former bearing date of the first day of November one thousand seven hundred and eighty-three, and the latter the twelfth day of November one thousand seven hundred and eighth-five, every part of which is hereby fully confirmed. And the said lines shall be marked as soon as the Indians can possibly make it convenient to come down and see it done, the present being their hunting season. And of their intention of attending for the said purpose they shall notify his honor the governor at least one month before their departure from the nation.

Eleventh, After the aforesaid lines are marked, neither white persons nor Indians shall be allowed to pass them without a special licence for that purpose, that for a white person to be from under the hand of his honor the governor, and that for a trader or Indian from under the hand of the agent of the State or his deputy residing in the nation. Any person of either party who shall be found transgressing this article shall be detained until the authority to whom such offender belongs shall be informed thereof.

Twelfth, In proof of their good faith and sincere intentions to perform the before mentioned articles, and for the security of the inhabitants of the said State, the Indians agree to leave in the hands of the commissioners five of their people, namely Chuwocklie Mico (of the Cowetas) Cuchas

Mico (of the Cussetas) Suckawockie (brother to the last named, also of the Cussetas) Eneathlocks (second man of the broken arrow) and Enautaleche (nephew to the head man of the Swaglos). The said Indians during their stay among the white people shall be provided with comfortable diet, lodging and clothing, and be well treated in ever other respect.

IN WITNESS whereof the parties have hereunto affixed their hands and seals the day and year before mentioned.

No. 02-281

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INYO COUNTY, CALIFORNIA, *et al.*,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN GAMING ASSOCIATION, AND INDIVIDUAL TRIBES IN SUPPORT OF RESPONDENTS

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LIST OF *AMICI CURIAE* TRIBES

Confederated Tribes of the Warm Springs Reservation
Eastern Band of Cherokee Indians
Grand Portage Band of Chippewa Indians
Grand Traverse Band of Ottawa and Chippewa Indians
Jamestown S'Klallam Tribe
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Mashantucket Pequot Tribal Nation
Muckleshoot Indian Tribe
Pechanga Band of Luiseno Mission Indians
Pueblo of San Ildefonso
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INTEREST OF *AMICI CURIAE*

Amici Curiae are two leading national Indian organizations and individual Tribes from throughout Indian country, all of which have a strong interest in the outcome of this case.[1] *Amici* share a firm commitment to effective law enforcement in Indian country, believing that maintenance of law and order is a fundamental responsibility of tribal governments and is essential to ensuring the welfare of tribal members. *Amici* also share a firm commitment to the view that tribal governments must be free to exercise their sovereign power, without undue state interference, to preserve the political integrity and core dignity of Tribes and to ensure the success of the federal policy of tribal self-determination. Finally, *Amici* share the unshakeable view that, far from being contradictory, these two commitments complement one another, such that effective law enforcement in Indian country does not depend upon the drastic revision to the doctrines of tribal immunity and tribal self-government sought by Petitioners.

Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Dedicated to protecting the rights and improving the welfare of American Indians, NCAI has worked closely with state governments and organizations such as the National Conference of State Legislatures to develop productive models of state-tribal cooperation. The unilateral approach

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[1] No one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

to law enforcement suggested by Petitioners in this case is diametrically opposed to those models.

Amicus National Indian Gaming Association ("NIGA") is a non-profit organization with 168 member Tribes. NIGA endeavors to assist Tribes in their efforts to build and maintain strong and self-sufficient tribal governments.

The individual *amici* Tribes represent a cross-section of Tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations, and histories. Like the other Tribes represented by NCAI and NIGA, however, they share a sense of outrage at the actions taken by Inyo County that gave rise to this case. They share an even deeper sense of outrage at the lead argument in Petitioners' brief – grounded as it is in stereotype – that if this Court does not authorize States and their subdivisions to take such actions, tribal reservations will become enclaves of lawlessness. Tribes and their members are firmly committed to fighting crime and its consequences and, to that end, work hand in hand with federal, state, and local law enforcement in an atmosphere of mutual respect. *Amici* are thus well placed to respond to Petitioners' suggestion that law enforcement imperatives justify the severe intrusion on both tribal immunity and the right of self-government that Petitioners ask this Court to ratify.

INTRODUCTION AND SUMMARY OF ARGUMENT

Raising the specter of "lawlessness" in Indian country, Petitioners come before this Court seeking the right to assert judicial authority against Tribes in order to search and seize tribal property. At issue are not just tribal personnel records, themselves documents of considerable importance to Tribes, but access to all manner of tribal property, including tribal

council minutes discussing critical governmental issues, records relating to sensitive matters such as cultural resource protection and negotiations with state or county counterparts, and historical items of great value to Tribes. Petitioners' argument thus extends to the very material of tribal government.

As demonstrated by Respondents' Brief, the Brief of the United States, and the Brief of the United South and Eastern Tribes ("USET"), time-honored doctrines of tribal sovereign immunity and tribal self-government foreclose the authority the County seeks. This case implicates the core of those doctrines.

The ability of Tribes to maintain the integrity and order of tribal property in accordance with the needs of their communities – an essential attribute of their sovereign authority, *see, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975) – requires that they retain control over outsiders' access to their records and other effects. For example, the decision whether and how to disclose government records requires difficult policy judgments that a sovereign must be able to make for itself. *See, e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (noting the "necessit[y] of centralizing determination" regarding disclosure of government records and the "possibilities of harm from unrestricted disclosure").

Petitioners' arguments would arrogate control of these decisions to local authorities, whose calculations may sometimes be "based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983). Such a transfer of authority would pose a clear affront to the core dignitary interests of the Tribes, interfering with the right of self-government, and threatening to reduce Tribes to "little more than private,

voluntary organizations." *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

This case similarly implicates the core of the tribal sovereign immunity doctrine. For though the Court has sometimes questioned the value of that doctrine (while nevertheless declining to rewrite it) when it appears to extend beyond "what is necessary to safeguard tribal self-governance," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998), here it is invoked for that very purpose.

Petitioners' principal argument for rewriting the doctrines of sovereign immunity and tribal self-government is their claim that if States and their subdivisions are not granted the right to unilaterally execute search warrants against Tribes, reservations will devolve into enclaves of lawlessness. This brief exposes the fallacy of that claim. In the first instance, Petitioners' argument ignores the fact that, even absent the search warrant power Petitioners seek, Tribes and their members are already subject to comprehensive federal, state, and tribal criminal jurisdiction and enforcement, such that the law enforcement interest in this case is very narrow. Moreover, Petitioners' argument even as to that circumscribed interest is premised on a caricature of Tribes and tribal governments, presenting them as unwitting pawns or even willing participants in the efforts of lawbreakers to evade arrest and prosecution. Petitioners thus ignore the hundreds of law enforcement partnerships – covering the entire range of law enforcement activity including investigation, search, arrest, extradition, and prosecution – that Tribes have formed with state and local governments. Pursuant to these partnerships, States, Counties, and Tribes work together, sharing authority, manpower, and resources, as they endeavor to ensure effective law enforcement in Indian country. Accordingly,

Petitioners' distorted description of Indian country law enforcement provides no reason to overturn settled doctrines of tribal immunity and the right to tribal self-government.[2]

ARGUMENT

I. Petitioners' Rote Invocation of the Needs of "State Law Enforcement" Presents No Justification for Overturning this Court's Settled Sovereign Immunity Jurisprudence or for Curtailing the Right to Tribal Self-Government.

As demonstrated in the Briefs of Respondents, the Brief of the United States, and the Brief of USET, Petitioners here seek a dramatic reworking of the doctrines of sovereign immunity and the right to tribal self-government. Petitioners argue principally that if States and their subdivisions are not granted the right to execute search warrants against Tribes, reservations will devolve into enclaves of lawlessness where "evidence and proceeds of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officials." Pet. Br. at 21. According to Petitioners, as a result of the court of appeals' decision, reservations have been transformed into potential "sanctuaries" for the "D.C. area sniper," "serial murderer[s] or rapist[s]," "child molester[s]," and "drug dealer[s]." Pet. Br. at 23.

As this Brief demonstrates, there is no legal or factual foundation for Petitioners' argument. *First*, the gross

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[2] This brief will not address the second and third questions raised in the Petition. *Amici* firmly believe that, given Petitioners' failure to raise the issue below, the question whether Tribes are persons entitled to bring a claim under 42 U.S.C. § 1983 is not properly before this Court. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

exaggeration of Petitioners and their *amici* aside, the law enforcement issue presented by this case is highly circumscribed. As California's chief law enforcement officer has stated in a memorandum to all California District Attorneys, Sheriffs, and Chiefs of Police, the decision of the court of appeals in this case "is very narrow in application and should have only a limited impact on local law enforcement."[3] Tribes and their members are subject to a comprehensive web of federal, state and tribal criminal jurisdiction and enforcement. *Federal* law enforcement officers unquestionably have authority to make arrests and to conduct searches of tribal property in the course of exercising their expansive criminal jurisdiction. Moreover, certain questions relating to searches and seizures by state and local officers of the property of *individual* Indians were addressed by this Court in *Hicks* and are not presented in this case.[4] The only issue here is the ability of States and their subdivisions – and not the federal government – to coerce access to documents and other property of *tribal governments* themselves. The fate of effective law enforcement in this country does not turn on that question.

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[3] Memorandum from Bill Lockyer, Attorney General, State of California, to All California District Attorneys, Sheriffs, and Chiefs of Police, at 2a (Apr. 16, 2002) (Appendix A).

[4] *Hicks* has engendered a vigorous debate, even as between the States themselves, as to whether it suggests that States have the inherent authority to issue process against tribal members in Indian country without any form of tribal consent, or whether tribal participation, such as was present in *Hicks*, is necessary. *Compare* Appendix A (California Attorney General reading *Hicks*' description of state authority broadly) *with* Appendix B (Memorandum from Patrick Irvine, Solicitor General of Arizona to all Division and Section Chief Counsels (May 9, 2002)) (cautioning that *Hicks* should be narrowly read). Although *Amici* firmly believe that the narrower reading of *Hicks* is appropriate, that issue is not presented for resolution in this case.

Second, and relatedly, Petitioners' argument is premised on the stereotypical and entirely unsupported premise that, absent the specter of state coercion, Tribes will willingly harbor criminals and conceal criminal evidence. In reality, Tribes around the country, in the exercise of their sovereignty, have voluntarily forged hundreds of effective law enforcement partnerships with their neighboring jurisdictions. Pursuant to these partnerships, States, Counties, and Tribes readily share not only evidence of criminal activity, but also authority, manpower, and resources as they work together to combat crime. Existing law enforcement practice, in other words, centers on cooperation, not coercion, and it has yet to produce hundreds of enclaves of lawlessness.

It is no doubt for these reasons that the United States, which has a clear and overriding interest in Indian country law enforcement as well as comprehensive enforcement powers there, has squarely endorsed the Tribes' position on this issue, *see* U.S. Br. at 14-28, and that States whose borders contain a significant portion of Indian country have taken the extraordinary step of also filing a brief in support of the Tribes.

A. The Law Enforcement Issues Presented By This Case Are Very Narrow.

Petitioners' claims ignore entirely the expansive (albeit complex) web of federal, state and local, and tribal criminal jurisdiction and enforcement authority that applies in Indian country.[5]

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[5] Indian country is defined at 18 U.S.C. § 1151, and includes, *inter alia*, all land within reservations whether or not owned by Indians, *id.*, and tribal trust lands, *see Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).

1. Entirely absent from Petitioners' Brief is any acknowledgement of the critical role played by federal law enforcement in Indian country. Congress has broad authority over Indian country and has enacted numerous criminal statutes that pertain to it. General federal criminal legislation, for example, applies to both Indians and non-Indians in Indian country. Hence, federal criminal statutes such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), firearms statutes, narcotics statutes, and the mail and wire fraud statutes restrict conduct in Indian country as elsewhere.[6]

Congress has supplemented these nationwide federal criminal statutes with several specific to Indian country. The Major Crimes Act, 18 U.S.C. § 1153, for example, provides federal jurisdiction over certain major felonies committed by Indians in Indian country, including murder, rape, kidnapping, assault, arson, robbery, and theft, regardless of the identity of the victim. *See id.*

The Indian Country Crimes Act ("ICCA"), 18 U.S.C. § 1152, another critical source of criminal prohibitions, imports into Indian country the federal criminal law applicable to places "within the sole and exclusive jurisdiction of the United States," *id.*, except for crimes in which both the perpetrator and the victim are Indians. The ICCA incorporates the Assimilative Crimes Act, 18 U.S.C. § 13, which in turn generally incorporates state criminal law and applies it as a matter of federal law to federal enclaves. *See generally Lewis v. United States*, 523 U.S. 155, 159-61 (1998). The ICCA thus extends to Indian country state

[6] *See, e.g., United States v. Juvenile Male*, 118 F.3d 1344, 1350-51 (9th Cir. 1997) (RICO); *United States v. Yankton*, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (firearms statutes); *United States v. Blue*, 722 F.2d 383, 384 (8th Cir. 1983) (federal drug laws); *United States v. Boots*, 80 F.3d 580, 593 (1st Cir. 1996) (federal wire fraud statutes).

substantive criminal law, which is incorporated into federal law and enforced by federal authorities. *See Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993).

Critically, and also ignored by Petitioners, all of these federal statutes are enforced by federal authorities with unquestioned jurisdiction over Indian country. The Federal Bureau of Investigation ("FBI") and the Bureau of Alcohol, Tobacco and Firearms, for example, have authority in Indian country to enforce federal laws, including the ability to make arrests throughout Indian country and to execute search warrants, even against tribal property. Accordingly, Petitioners' purported concern that the D.C. area sniper, narcotics traffickers, organized crime figures, or other federal lawbreakers could somehow seek sanctuary on reservations for their off-reservation crime is frivolous. Moreover, 18 U.S.C. § 1073 makes it a federal crime to travel interstate with the intent to avoid prosecution for any crime which is a felony in the jurisdiction from which the fugitive is fleeing. Thus, for example, any fugitive who sought refuge on a reservation after traveling interstate to avoid a state law prosecution would be subject to search and arrest by federal authorities throughout Indian country.

2. States, too, play an important law enforcement role with respect to Indians and Indian country, and will continue to do so regardless of the decision in this case. Outside Indian country, the State has criminal jurisdiction over all persons, Indians and non-Indians alike. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 421-22 (1994). In addition, for more than a century it has been clear that States have jurisdiction even over crimes committed in Indian country, when the crimes are committed by non-Indians and are either against non-Indians, *see Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881), or are

victimless, *see Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

Congress has supplemented this general authority with specific grants of jurisdiction to particular States. For example, in 18 U.S.C. § 1162, commonly known as Public Law 280, Congress gave certain States, including California, extensive criminal jurisdiction over crimes committed within their Indian country. Several other States later assumed such jurisdiction under the statute to varying degrees. *See generally Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-72 & n.9 (1979) (describing operation of Public Law 280 and later amendments). The net result of this and similar federal statutes, *see* 439 U.S. at 471 n.8, is that a significant portion of Indian country is subject to state criminal jurisdiction.[7]

Contrary to Petitioners' contentions, in the decision below renders these statutes unenforceable. As the Brief for the United States correctly observes, "[t]he recognition of tribal immunity to state process does not prevent state officers from obtaining information in other ways." U.S. Br. at 26. For example, absent other prohibitions, States have the authority in the circumstances described in *Nevada v. Hicks* to seek to execute search warrants against individual tribal members. Moreover, in the substantial portion of

[7] The cooperative approach to Indian gaming embodied in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, allows for further expansion of state criminal jurisdiction. Before class III (casino-style) gaming may be conducted on Indian lands, the relevant Tribe and State must attempt to negotiate a compact. Among the items Congress provided may be addressed in a state-tribal compact are "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; [and] the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. § 2710(d)(3)(C).

Indian country subject to state criminal jurisdiction pursuant to Public Law 280 or its equivalent (including California), States have broad authority to make arrests on reservations for state law crimes, whether or not committed in Indian country. And, of course, the federal government has the power in non-Public Law 280 States to make arrests for on-reservation crime while enforcing state substantive criminal law as incorporated through the ICCA.

3. The elaborate system of federal and state criminal enforcement is reinforced by tribal criminal justice systems. Tribes retain general (and often concurrent) jurisdiction over offenses committed by Indians. As discussed in greater detail below, many Tribes now have significant police forces, and those forces work closely with federal and state authorities on criminal matters.

The net result of this comprehensive and overlapping scheme is a picture of law enforcement in Indian country that belies Petitioners' claims. The Attorney General of California was correct in stating that the opinion of the court below "is very narrow in application and should have only limited impact on local law enforcement." Appendix A at 2a.

B. Tribes, Acting as Sovereigns and Free of State Encroachment, Already Serve as Effective Partners in Criminal Law Enforcement.

Even with respect to the narrow law enforcement issue presented by this case, maintenance of a due regard for tribal sovereignty will not impede the effective enforcement of the criminal laws. The claims of Petitioners and their *amici* that adherence to the existing doctrines of immunity and self-government will lead to the establishment of hundreds of enclaves of lawlessness are based on caricature, and ignore a

fundamental reality: Tribes have every bit as much of an interest in eradicating crime, be it within Indian country or without, as do States and their subdivisions. To that end, and in the exercise of their sovereignty, Tribes have forged hundreds of effective law enforcement partnerships with neighboring jurisdictions. A decision respecting tribal self-government in this case will simply leave these partnerships intact.

1. Tribes Have Entered Into Numerous Cooperative Law Enforcement Agreements With States and Counties Around the Country.

A tremendous amount of cooperation in the law enforcement arena already takes place between Tribes and interested States and Counties throughout Indian country. Perhaps the most obvious manifestations of this cooperation are the scores of formal cooperative law enforcement agreements entered into between Tribes and their neighboring jurisdictions. *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (noting the "host of cooperative agreements between tribes and state authorities ... to provide law enforcement") (O'Connor, J., concurring); Douglas R. Nash & Christopher P. Graham, *'The Importance of Being Honest': Exploring the Need for Tribal Court Approval for Search Warrants Executed In Indian Country After* State v. Mathews, 38 Idaho L. Rev. 581, 593 (2002) (observing that "tribes and states have . . . negotiated numerous cooperative agreements in critical areas of law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 (1999). These agreements are grounded in the shared recognition of Tribes and numerous States and Counties that, by pooling their law enforcement resources and expertise,

they can forge effective alliances and realize mutual benefits across jurisdictional lines. *See, e.g.*, Tulalip Tribes and Snohomish County (Washington) Cooperative Law Enforcement Agreement at 3 ("Tulalip Tribes Agreement") ("the Tribes and the County each wish to facilitate a cooperative approach to law enforcement to enhance public safety for all persons and property within the Reservation").

Amicus NCAI maintains a partial repository of these agreements which, although far from complete, contains well over one hundred documents.[8] Although the agreements vary in their details, they contain a number of critical features.

First, they provide for the deputization of tribal police officers who meet certain minimum qualification and training requirements as state or county officers, allowing tribal police to enforce state criminal law within their Tribe's Indian country. *See, e.g.*, Agreement Between the New Mexico State Police and the Navajo Tribe at 3 ("[Navajo] Peace Officers commissioned pursuant to this Agreement shall have all the powers of New Mexico Peace Officers to enforce state laws..., including but not limited to the power to make arrests for violations of state laws."); Cooperative Law Enforcement Agreement Between the Leech Lake Band of Ojibwe Indians and the Counties of Beltrami, Cass, Hubbard, Itasca and the City of Cass Lake (Minnesota) at 1 ("Leech Lake Agreement"); Cooperative Agreement Providing for Cross-Deputization of Law Enforcement Officers of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the City of Wolf Point, the City of Poplar, the Montana Highway Patrol, and Roosevelt County at 4.

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[8] *See* http://www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp. The law enforcement materials cited in this brief are available on the NCAI website.

Thus, far from treating Tribes as unworthy or unreliable partners in the task of law enforcement, many States and Counties have shared their criminal enforcement authority with Tribes to further crime control. Indeed, in recognition of the benefits of such arrangements, a number of States provide for the deputization of tribal officers by statute. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3874; *see also* N.M. Stat. Ann. § 29-1-11; 1987 N.C. Sess. Laws ch. 427; Nev. Rev. Stat. 171.1255 (2001).

Second, the agreements often provide for the deputization of state officers as tribal police officers so that the former can enforce tribal laws. *See, e.g.*, Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska at 1-2 (authorizing the deputization of Nebraska police officers "to enforce Federal, State and Winnebago Tribal Laws within the exterior boundaries of the Winnebago Indian Reservation vis-à-vis Indians" with Winnebago officers likewise deputized to enforce state law); Cooperative Law Enforcement Agreement Between and Among the Bureau of Indian Affairs, Three Affiliated Tribes, and County of Montrail (North Dakota) at 2-3; A Law Enforcement Agreement Between and Among the Cherokee Nation, the United States of America, the State of Oklahoma and its Political Subdivisions, the Various Boards of County Commissioners, and Various Law Enforcement Agencies at 3. These provisions reflect a recognition by the parties involved that tribal criminal laws form an important part of the law enforcement arsenal, such that their reach should be extended to the greatest extent possible.

Third, the agreements frequently address the execution of search and arrest warrants within Indian country, and reflect a variety of cooperative approaches to these subjects. Some agreements provide that to execute a search warrant within

the boundaries of a reservation, a State or County should first have its warrant converted into a tribal court warrant, with either tribal or non-tribal police officers, or a combination of both, executing the warrant. *See, e.g.*, Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance Between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet (Michigan) at 3-5 ("County law enforcement officers must present search warrants authorizing the search for evidence located on Trust lands to the State Court and Tribal Court for enforcement, and for execution by Tribal law enforcement authorities. The [Little Traverse] Prosecuting Attorney agrees to review and prepare search warrants for Trust lands."). Others provide that tribal police will serve state warrants for their partner jurisdictions. *See, e.g.*, Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County (Michigan) at 4 ("Grand Traverse Agreement") ("County law enforcement officers shall present search warrants authorizing the search for evidence located on the Tribe's reservation and Indian country . . . to Tribal law enforcement authorities for execution."); Cooperative Agreement Regarding Law Enforcement Between the Fond du Lac Band of Lake Superior Chippewa and St. Louis County (Minnesota) at 3-4.

With respect to arrest warrants, the agreements typically provide that tribal police will participate in making arrests for their neighboring jurisdictions based on either state or tribal process. *See, e.g.*, Interlocal Cooperation Agreement for Mutual Aid Between City of Burlington, Washington, and Swinomish Indian Tribal Community at 3 ("The City and Tribe agree to cooperate in the execution of warrants properly issued at the request of the other party and to allow duly authorized enforcement officers of the requesting jurisdiction, and officers of the jurisdiction whose law is

applicable, to participate in serving the warrant, upon request"); Law Enforcement Agreement Among the Eastern Shoshone And Northern Arapaho Tribes, Hot Springs County (Wyoming), and the Bureau of Indian Affairs at 6; Agreement By and Between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition at 2.

Fourth, and squarely in keeping with this collaborative approach, the parties to these agreements often pledge substantial help to each other in carrying out their investigatory activities. *See, e.g.*, Cross-Deputization Agreement Among the City of Bennington, Oklahoma, the Bureau of Indian Affairs, and the Choctaw Nation of Oklahoma at 3-4 ("all parties to this Agreement shall cooperate with each other to provide comprehensive and thorough law enforcement protection, including but not limited to . . . performing investigations."); Leech Lake Agreement at 4 ("In exercising authority under this agreement, Band Law Enforcement Officers shall prepare investigative reports in accordance with the County's or City Procedures, and at the request of the Sheriff, County or City Attorney, shall perform any additional or supplemental investigation, including interviewing of necessary witnesses or the execution of any necessary process including search warrants."); Memorandum of Understanding Concerning Investigation and Prosecution of Violations of the State of New Mexico Gaming Laws on Acoma Pueblo Lands by the District Attorney for the Thirteenth Judicial District at 4-7; Tulalip Tribes Agreement at 11 and Attachment A.

While the sharing of documents and other materials is generally subsumed in such pledges, the parties to these agreements often make their willingness to exchange investigative materials explicit. *See, e.g.*, Joint Powers Agreement Between the Hoopa Valley Tribe and the County

of Humboldt (California) at 3-4 ("The Hoopa Valley Tribal Police shall conform to Humboldt County deputy sheriffs' deadlines respecting timely submission of investigation, arrest and other reports); Leech Lake Agreement at 4; Cross-Commission Agreement Between the Navajo Nation and the McKinley County (New Mexico) Sheriff's Office at 6.

Through their cooperative agreements, then, Tribes, States, and Counties pledge to work together extensively on matters of criminal law enforcement. They share authority, manpower, information and other resources in their common fight against crime. And they evidence their belief that, contrary to the claims of Petitioners and their supporting *amici*, effective law enforcement in Indian country can take place in an atmosphere of mutual respect and collaboration. "Practice has found that the relationship that arises from the joint training, deputization, and working of tribal and nontribal police officers under a cross-deputization program can enhance the effectiveness of enforcement." Conference of Western Attorneys General, *American Indian Law Deskbook* 413 (2d ed. 1998).[9]

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[9] Although Petitioners entirely ignore the relevance of cooperative agreements, this Court has previously recognized that voluntary arrangements are the preferred way – and at times the only way – to accommodate the interests of both the States and the Tribes. In *Potawatomi Indian Tribe*, 498 U.S. at 514, for example, the Court held that, although a state could require Indian retailers to collect state-imposed taxes on certain sales to non-members, tribal sovereign immunity precluded States from suing Tribes to collect the taxes. The Court noted that the States had alternative mechanisms available to them, including the ability to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." *Id.*

At least partly in response to this Court's suggestion in *Potawatomi Indian Tribe*, and evidencing an ever-strengthening commitment on the part of States and Tribes to address issues of mutual concern through cooperation, hundreds of state-tribal agreements, covering a broad range of topics, have been negotiated during the past decade. *See generally*

2. Tribes Have Promulgated Extradition Codes and Court Rules That Further Evidence the Tribes' Commitment to Effective Law Enforcement.

Nor are formal agreements the only cooperative mechanisms for ensuring effective law enforcement. Numerous Tribes, for example, have well-developed extradition codes.[10] That of the Sisseton-Wahpeton Sioux Tribes in North Dakota is illustrative. It provides, unambiguously, that "[i]t is the duty of the Tribal Chairman...to have arrested and delivered up to the demanding Executive Authority of any other jurisdiction any fugitive from justice that has committed an offense in another jurisdiction." Sisseton-Wahpeton Sioux Tribal Ordinance, Ch. 30-02-01. The requesting jurisdiction must simply attest that the subject of its request committed an offense within its borders and subsequently fled. While the fugitive is then entitled to a hearing, the Code plainly states, in language replicated in numerous other Tribal extradition provisions, that "[t]he guilt or innocence of the accused of

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David H. Getches, *et al.*, Federal Indian Law at 619-20 (4th ed. 1998). These agreements often address, in a very detailed and sophisticated manner, issues of enforcement and information-sharing. *See, e.g.*, Tax Agreement Between Bay Mills Indian Community and the State of Michigan at 33-49; Cooperative Agreement Between the New Mexico Environmental Department and the Pueblo of Laguna at 4-7.

[10] *See, e.g.*, Poarch Band of Creek Indians Code, sec. 9-2; Nez Perce Tribal Code, Ch. 2-1, R. 20; Confederated Tribes of the Umatilla Indian Reservation Extradition Code; Fort McDowell Yavapai Community Law and Order Code, Ch. 7; White Mountain Apache Tribe, Criminal Code, Ch. 3; Salt River Pima-Maricopa Indian Community Tribal Code, Ch. 7; Ute Indian Tribe of the Uintah and Ouray Reservation Law and Order Code, Title XII, R. 33.

the crime charged may not be inquired into by the Chairman or by the Tribal Judge in any proceeding after the demand for extradition is submitted, other than to the identification of the accused." *Id.* Ch. 30-10-01. Such provisions are common in Indian country.[11]

Tribal and state courts have also agreed, by way of rule or decision, to honor each other's judicial acts, including warrants. In Michigan, for example, the state courts and many tribal courts have adopted a companion rule providing that they will treat one another's "judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts" as presumptively valid. Mich. Ct. R. 2.615; Grand Traverse Band Ct. R. 10.001-10.107; Bay Mills Indian Community Ct. R. 1.101-1.301; Hannahville Indian Community, Ct. R. 1.000-1.300; Little River Band of Ottawa Indians Regs. 1.100-1.103; Little Traverse Bay Bands of Odawa Indians, Ct. R. 4.000-4.400; *see also* Hon. Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. Det. Mercy L. Rev. 709 (1999) (article by Michigan Supreme Court Justice explaining history of the rules and other ways in which Michigan state and tribal courts cooperate). Other jurisdictions have similar rules in

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[11] In *Hicks*, this Court cited the Ninth Circuit's decision in *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), as the only support for the proposition that, if state process cannot run against individual Indians on reservations, those reservations might become asylums for fugitives. *Hicks*, 533 U.S. at 364 n.6. *Turtle* addressed a situation "in which the Navajo Tribal Court refused to extradite a member to Oklahoma because tribal law forbade extradition except to three neighboring States." *Id.* However, the *Turtle* case was decided almost 34 years ago. The very year after the decision, in 1970, the Navajo Nation amended its extradition code to remove the offending geographical limitations, in order that "Navajo land not become an asylum for criminals." Resolution of the Navajo Tribal Council re Extradition (May 14, 1970). Other tribal extradition codes are likewise free of such limitations.

place. *See, e.g.*, N.C. Gen. Stat. § 1E-1 (according "full faith and credit" to judgments, decrees or orders of the Eastern Band of Cherokee Indians); Cherokee Code § 25-5 (companion rule of the Eastern Cherokees); N.D. Ct. R. 7.2; Ralph J. Erickstand & James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. Rev. 569 (1995) (former North Dakota Supreme Court Justice explaining history of North Dakota Rule and initiatives taken by the Conference of Chief Justices to foster cooperation between state and tribal courts); Wash. Super. Ct. Crim. R. 82.5; *see also Husband v. Wife*, MPCA-2001-1065, slip op. at 13 n.6 (Mashantucket Pequot Ct. App. Jan. 24, 2003) ("[I]t is the Tribe's public policy to have a strong presumption of enforcement of Connecticut judgments in the Mashantucket courts whenever possible.").

3. A Tremendous Amount of Law Enforcement Cooperation Takes Place on the Ground Between Tribes and Their Neighboring Jurisdictions.

Taken together, the cooperative agreements, extradition ordinances, and court rules canvassed above – along with numerous less formal mechanisms for cooperation – lay the foundation for the extensive interaction that takes place in Indian country between state, county, and tribal law enforcement authorities. Across the nation, officers from neighboring tribal and non-tribal jurisdictions coordinate their activities and share information on a regular basis. They do so not as a result of the bullying that took place in this case, but rather voluntarily and out of respect for the value that their colleagues in law enforcement bring to the table.

Within the parameters of this brief it is impossible, of course, to document the full extent of the collaboration that

Tribes engage in with other jurisdictions. But *Amici* hope that a quick survey of the situation in three very different States will convey to the Court at least some of the flavor of that collaboration.

Arizona. "Law enforcement in Arizona has a proud history of cooperation and professionalism." Letter from Paul K. Charlton, United States Attorney for the District of Arizona to Tribal and Non-Tribal Members of the Law Enforcement Coordinating Committee for the District of Arizona (Feb. 11, 2002) (Appendix C at 9a). In the wake of this Court's decision in *Hicks*, the Solicitor General of Arizona expressed concern that a broad reading of the decision might lead to an erosion in that cooperation between tribal and non-tribal jurisdictions, and urged all state and local agencies to "continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency." Appendix B at 6a-7a. The United States Attorney expressed similar sentiments, noting that "[w]hile the impact and meaning of the *Nevada v. Hicks* decision is discussed, it is my hope that state, county and federal law enforcement agencies will continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency." Appendix C at 9a. The United States Attorney emphasized that "[t]o do otherwis[e] would create public safety concerns and reverse the high standards of professionalism each of our agencies have set." *Id.*

That both state and federal officials in Arizona have provided ringing endorsements of the value of cooperating with Tribes on law enforcement matters is not surprising. Like their counterparts elsewhere in the country, the twenty-two Arizona Tribes (who together and with their members occupy approximately 20 million acres of trust land, *see Tracy v. Superior Court*, 810 P.2d 1030, 1043 n.12 (Ariz.

1991)), have demonstrated a serious and abiding commitment to law enforcement, and have long engaged in joint and cooperative law enforcement mechanisms with the state and local governments to this end. The Tribes boast sizeable police departments: in 2000, for example, the Tohono O'odham Nation had 76 full-time sworn officers, the Gila River Indian Community had 58; the Salt River Pima-Maricopa Indian Community ("Salt River") had 51; the White Mountain Apache Tribe had 36; the Colorado Indian Tribes had 32; and the Navajo Nation, with a police department that dwarfs those of many counties and municipalities, had 321. Matthew J. Hickman, U.S. Dep't of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement, 2000,* at 2, Table 4 (Jan. 2003). Those departments have earned commendations for their effective police work. *See* Salt River Letters of Commendation. Their police chiefs are active participants in the Arizona Peace Officers Standards and Training Board, and under Arizona law, as noted above, tribal police officers generally "possess and exercise all law enforcement powers of peace officers in this state." Ariz. Rev. Stat. § 13-3874.

Cooperation between the Tribes' law enforcement agencies and those of neighboring jurisdictions is a hallmark of their existence. At Salt River, for example, the police detectives are so highly proficient that the federal government no longer utilizes FBI agents to investigate federal crimes – Salt River detectives work up federal cases and send them directly to the United States Attorney's Office for prosecution. Those same detectives, along with Salt River police officers, exchange information on at least a weekly basis with their counterparts in neighboring jurisdictions, which include the City of Phoenix, the City of Scottsdale, the City of Tempe, the City of Mesa, Maricopa County, and the State. Tribal police officers regularly

domesticate and execute search warrants for other jurisdictions – the federal government itself has never seen a reason to execute its own search or arrest warrants on the reservation. *Cf.* U.S. Br. at 21 n.10 (noting that although the United States "may issue and execute process directed at state and tribal property," it "ordinarily does not find it necessary to resort to such process"). The Tribe also participates in a number of task forces with surrounding jurisdictions that are targeted towards specific crimes, including homicides, gang violence, and auto theft. And pursuant to its extradition ordinance, Salt River has extradited over 18 fugitives from justice within the last three years alone, with no extradition requests denied by the Tribal Court. *See* Salt River Extradition Log.

The story is much the same at other Arizona Tribes. The White Mountain Apache Tribe participates in a multi-jurisdictional task force that nicely illustrates the manner in which tribal and non-tribal authorities work together to reduce crime. Named the Fort Apache Safe Trails Task Force, it brings together the FBI, the Bureau of Indian Affairs, the White Mountain Apache Police Department, the Navajo County Sheriff's Department, the Arizona Department of Public Safety, and the Pinetop/Lakeside Police Department. *See* Memorandum of Understanding Involving White Mountain Apache Police Department and Federal, State, and Local Law Enforcement Agencies at 1. Each of the participating agencies contributes law enforcement officers to a joint investigative and enforcement body. *Id.* at 2. Those officers are then federally deputized, and work together as a team, freely sharing resources, information and evidence in investigations related to murder, rape, child abuse, narcotics trafficking, arson and other crimes. *Id.* at 2-5.

The Tohono O'odham Nation, meanwhile, not only has in place a cooperative law enforcement agreement with Maricopa County, but also engages in extensive efforts with federal and state authorities to stem the flow of illegal immigrants and narcotics coming across the Mexican border. *See* Tohono O'odham Nation Law Enforcement Materials. The Tribe assists in apprehending approximately 800 illegal immigrants and thousands of pounds of narcotics a month, spending $2.5-$3 million a year on border-related law enforcement issues alone. *Id.* In the past year, moreover, the Tribe, like other border Tribes, has worked closely with federal and state agencies on Homeland Security issues. *Id.*[12]

Michigan. The Michigan Tribes differ in significant respects from their Arizona counterparts. Perhaps most notably, they have far smaller land bases. However, they share a similar commitment to criminal law enforcement, and to working with their neighboring jurisdictions to this end.

Michigan Tribes have entered into a good number of cooperative law enforcement agreements, and some of their salient provisions are quoted above. In the main, those agreements provide for cross-deputization, the execution of state search and arrest warrants in Indian country by Tribal police (with domestication of the search warrants sometimes

[12] When Arizona joined the Union, it was required to acknowledge what was then understood about the relationship between States and Tribes: that the State had no right or title to Indian lands within the State, and that those lands were and would "remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Ariz. Rev. Stat. Enabling Act, Sec. 20. As required, Arizona included this "disclaimer provision" in the new State's Constitution. Ariz. Const. art. XX, par. 4. Arizona is not a Public Law 280 State.

required), and cooperation on investigations. Michigan state and tribal courts have also, as previously discussed, promulgated Rules according presumptive validity to one another's judicial acts, including warrants. *See supra* p. 19.

These provisions have resulted in a great deal of cooperation on the ground. The Grand Traverse Band, for example, regularly provides governmental documents, surveillance tapes and other information to state and county officials in connection with their investigation and prosecution of crime. Hence, the Band supplied state prosecutors with its casino customer activity journal and other records in connection with the well-publicized prosecution of a non-Indian on racketeering charges in Antrim County (the defendant had attempted to launder some of his ill-gotten gains through the Band's casino), and authorized several employees to testify in the matter. *State v. Roote,* No. 02-0761-FY-3 (86th Dist. for the County of Antrim, Mich. 2002). The Leelanau County Sheriff has stated unequivocally that his "agency has an 'excellent' working relationship with [the] Tribal Police Department . . . [Tribal] officers have never hesitated to help out when requested and this benefits the entire county!'' Letter From Leelanau County Sheriff's Office to Grand Traverse Band (Sept. 1, 1998). That assistance extends to all manner of volatile and challenging situations. Leelanau County Sheriff's Office/Grand Traverse Band Police Dep't Mutual Assistance Summary.

This same extensive web of law enforcement cooperation is common elsewhere in Michigan. Little Traverse police officers, for example, regularly collaborate with their Emmett County counterparts on the execution of warrants and preserve evidence for them. *See, e.g.* Little Traverse Police Report #55-040-03 (Feb. 7, 2003). The same is true for the Little River Band of Ottawa Indians, which

responded to 158 requests for assistance from other jurisdictions in 2002. Little River Band of Ottawa Indians, Dep't of Public Safety Yearly Report at 1, 2002.

Washington. Washington State (with its 29 federally recognized Tribes) provides another important example of how Tribes and their neighboring jurisdictions cooperate on law enforcement matters, whether they have formal collaborative agreements in place or not. Although the Suquamish Indian Tribe has no written arrangement with its neighbors on law enforcement matters, its police department regularly transmits reports and evidence of criminal activity to its state and county counterparts. Suquamish Police Mail Log (recording 60 such transmittals in 2002). When state or county officers wish to search trust property, they ask the tribal court to issue a warrant, which tribal police then execute for them. *See, e.g.*, Order, *Washington v. A Gray and White Double Wide – 17631 Crummit Lane* (Suquamish Tribal Ct., Sept. 27, 2002).

The Swinomish Indian Community, meanwhile, has separate cooperative agreements in place with at least four of its neighbors: Skagit County, the City of Burlington, and the towns of LaConner and Coupeville. The net result is the same: a great deal of interaction and collaboration between the jurisdictions. The Swinomish Police Department frequently conveys police reports, witnesses statements, and evidence within its possession to federal, state and county authorities, *see* Swinomish Police Department Log Sheet (recording scores of transmittals); Skagit County Prosecutor's Request Form; Correspondence with Federal Aviation Administration. Its officers provide all manner of assistance to their counterparts in other departments, and regularly receive expressions of gratitude for doing so. *See* Commendation Letters to Swinomish Police Dep't from Town of La Conner Police Dep't, City of Chelan Police

Dep't, Skagit County Police Dep't, and the Federal Bureau of Investigation.

A similarly high level of cooperation exists at the Tulalip Tribes, which have a formal cooperative agreement in place with Snohomish County and collaborate informally with other neighbors. Search warrants, are domesticated by the tribal court and executed jointly by tribal and non-tribal officers. *Espitia v. Tulalip Tribes*, No. TUL-CR-10/02-476, Search Warrant (Tulalip Tribal Ct. filed Oct. 10, 2002) (search warrant and supporting materials). The Tribes frequently engage in joint investigations with state, county and city police forces regarding all manner of serious crime, with the collaboration yielding impressive results. *See id.* And the Tribes regularly share materials pertinent to law enforcement, including documents of the type at issue in this case. *See* Order, *In re Personnel Files of Dr. Melvin E. Chandler*, No. TUL-CR-12/96-693 (Tulalip Tribal Ct. Jan. 16, 1997) (releasing personnel records of a non-Indian doctor to state and county officials in connection with their investigation of potential criminal misconduct).

The situations in Arizona, Michigan and Washington are replicated throughout the country. Tribes, acting as sovereigns, and free of state coercion, regularly collaborate with their neighboring jurisdictions in a common fight against crime. Indeed, even in California, cooperation exists between Tribes and interested Counties. The Hoopa Valley Tribe and Humboldt County, for example, have in place a law enforcement agreement, quoted above, which calls for extensive cooperation on policing and investigatory matters. Pursuant to that agreement, tribal police officers work closely with their county counterparts, often putting their lives in great danger while doing so. *See, e.g.*, Humboldt County Drug Task Force and Hoopa Valley Tribal Police Department Investigative Reports.

All of this is not to say, of course, that Tribes do not from time to time make mistakes, or act in a manner that other jurisdictions may view as less than fully cooperative. Tribal governmental decisions, like state and county decisions, are made by human beings, and hence are subject to error or reasonable professional disagreements. As can be expected whenever sovereigns interact, there have been occasional (and sometimes well-publicized) stalemates. What is relevant, however, is how few of these incidents there have been, how even they have generally been resolved (sometimes with federal help), and how Tribes have overwhelmingly demonstrated a commitment to law enforcement cooperation.[13]

[13] Petitioners' claims of potential "lawlessness" appear even more far-fetched in the gaming context. IGRA gives the National Indian Gaming Commission (the "NIGC") extensive powers of oversight in order to "shield [Indian gaming operations] from organized crime and other corrupting influences." 25 U.S.C. § 2702(2); *see generally* § 2706(b)(3) (authority to "conduct . . . background investigations"); *id.* § 2706(b)(4) (authority to "inspect, examine, photocopy and audit" records); *id.* § 2715(a) (subpoena authority); 25 C.F.R. §§ 571.1-571.14 (NIGC regulations implementing statute). Congress has further provided that the NIGC "shall, when [any information it receives] indicates a violation of Federal, State or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials." 25 U.S.C. § 2716(b).

Moreover, States have bargained for the inclusion of a broad range of regulatory provisions in state-tribal gaming compacts. Of particular relevance here, States have demonstrated the ability to gain liberal access to tribal casinos and to casino records through the compacting process. *See, e.g.*, N.M. Stat. Ann. § 11-13-1 (New Mexico Indian Gaming Compact) (providing that State may inspect public and non-public areas of gaming facilities without prior notice, and that State may copy gaming records and disclose any gaming operation records "as necessary to audit, investigate, prosecute or arbitrate violations of this Compact *or other applicable laws*") (emphasis added).

Against this backdrop, Petitioners' speculation about the potential for lawlessness, predicated as it is on nothing but innuendo, stereotype and hyperbole, rings hollow. The court of appeals' decision does not mark some radical departure from existing law and practice. To the contrary, it conforms to the collaborative approach to law enforcement that prevails throughout much of Indian country, and that, far from creating hundreds of enclaves of lawlessness, has led to an enhancement of both non-tribal and tribal law enforcement capabilities. Tribes presently play a vital role in law enforcement, and many States and Counties place great stock on that role. Petitioners' claims provide no reason for this Court to revisit its well-established doctrines in the areas of tribal sovereign immunity and self-government.

* * * * *

Nearly sixteen years ago, California and numerous *amici* appeared before this Court and argued that the States'

As part of the intensive regulation to which Tribes and the federal government subject Indian gaming operations, the Department of Justice monitors the operations for any signs of encroachment by organized crime, and has repeatedly concluded that no link exists between the two. *See, e.g., Indian Gaming Regulatory Act: Hearings Before the* Senate *Comm. on Indian Affairs*, 107th Cong. at 63 (July 25, 2001) (statement of Bruce G. Ohr, Chief, Dep't of Justice, Organized Crime and Racketeering Section, Crim. Div.) ("The Department has found no evidence of a systematic infiltration of Indian gaming by elements of organized crime"). Numerous academic studies, moreover, have concluded that Indian gaming actually causes a decrease in crime because of the substantial oversight and the greater funds available for law enforcement activity. *See, e.g.*, National Opinion Research Center, University of Chicago *et al.*, *Gambling Impact Behavior Study: Report to the National Gambling Impact Study Commission* 65-70 (1999) (concluding that there is no link between the introduction of casino gaming and overall increases in crime).

interest in effective law enforcement meant that they should be able to regulate Tribes in the conduct of their gaming operations. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987) (noting California's argument that its gambling laws may be applied to "high stakes, *unregulated* bingo, the conduct which attracts organized crime"); *see also* Appellants' Closing Br., at 9-10 (Oct. 20, 1986) (No. 85-1708) (arguing that tribal games "create substantial risks of organized criminal infiltration" and that "unregulated bingo creates substantial organized crime risks, and to argue otherwise ignores the lessons of past experience"); Appellants' Opening Br. 21, 25-29 (Aug. 8, 1986) (No. 85-1708) (same). This Court rejected the argument, *see* 480 U.S. at 221-22, and as events have shown, California's speculation about law enforcement imperatives has proven to be unfounded, *see supra* note 13.

Petitioners and their *amici* appear today before the Court making a virtually identical argument, advancing unsupported claims about the specter of lawlessness, but to an even graver end: state and county regulation of tribal government itself. The outcome should be the same: Petitioners' hyperbole is insufficient to trump long-standing notions of tribal sovereign immunity or to allow for the serious infringement on the Tribes' established right to self-government that Petitioners' position would entail.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix A

Bill Lockyer
Attorney General

State of California
Department of Justice

April 16, 2002

To: ALL CALIFORNIA DISTRICT ATTORNEYS, SHERIFFS AND CHIEFS OF POLICE:

Re: ***Impact of Bishop Paiute v. County of Inyo***

This letter is intended to provide guidance regarding enforcement of California's criminal laws on tribal lands in light of the recent decision of the United States Court of Appeals for the Ninth Circuit in *Bishop Paiute v. County of Inyo* (2002) 275 F.3d 893. Public Law 280 (18 U.S.C. § 1162) grants California jurisdiction over offenses committed by or against Native Americans in Indian country and specifies that the state's criminal laws have the same force and effect on tribal lands as they do elsewhere in the state. In *Bishop Paiute*, the Ninth Circuit found that tribal sovereignty limits criminal law enforcement under Public Law 280, with regard to search warrants seeking to obtain "uniquely tribal property" from a tribe. Specifically, search warrants to obtain tribal casino employment records in the course of a welfare fraud investigation were found to be an improper exercise of Public Law 280 jurisdiction.

Representatives of several law enforcement agencies have expressed concerns over the adverse impact of the *Bishop Paiute* decision on criminal law enforcement on Indian lands in their county and on the possibility of personal civil liability under 42 United States Code section 1983, the federal civil

rights law, if search warrants are served in violation of this case. In *Bishop Paiute*, individual civil liability under section 1983 was imposed. While this concern is understandable, the Attorney General believes the application of this opinion is actually very narrow and compliance easily achieved.

The Attorney General disagrees with the legal reasoning underlying the *Bishop Paiute* opinion, and further appellate review continues. However, even if the opinion becomes final, it is very narrow in application and should have only limited impact on local law enforcement. The following addresses specific law enforcement situations and the impact of the *Bishop Paiute* opinion:

- Authority to Enforce Criminal Laws for Crimes Committed Inside and Outside Indian Country:

  Except as detailed below, the authority granted by Public Law 280 and state law, to enforce state criminal laws against both Indian and non-Indians, for crimes committed inside and outside Indian country, remains unchanged by they *Bishop Paiute* opinion.

- Authority to Arrest or Detain Inside Indian Country:

  The criminal jurisdiction granted by Public Law 280 renders an arrest in Indian country no different from an arrest by a sheriff or police officer anywhere else in the jurisdiction. By virtue of Public Law 280, a reservation boundary is nonexistent for criminal jurisdiction purposes, and this unaffected by the *Bishop Paiute* opinion.

- Authority to Conduct Searches and Seizures Inside Indian Country Which are Directed to an Individual:

  There is no question that a search warrant (or subpoena) may be directed at an individual tribal member. The *Bishop Paiute* opinion specifically acknowledges this point. The search warrant (or subpoena) can be directed to the individual, his personal property or his residence. This analysis also applies to warrantless searches.

- Authority to Conduct Searches and Seizures Inside Indian Country Which are Directed to the Tribe:

  The area affected by *Bishop Paiute* is the service of search warrants (and subpoenas) where the object is to obtain "uniquely tribal property" held by the tribe. This phrase includes business, employment, health and housing records maintained by the tribe. Until the *Bishop Paiute* litigation is resolved, legal process should not be used to obtain such property. Other options for obtaining needed evidence should be explored, including seeking the tribe's cooperation or obtaining the information from other sources.

As stated above, the *Bishop Paiute* case remains in litigation. For this reason, the holding in the case, its application and import to California law enforcement may change. The Ninth Circuit is currently considering a request by Inyo County to reconsider the decision. It is possible the decision may be modified by the Ninth Circuit or changed as a result of an appeal to the Supreme Court of the United States.

If you have questions regarding this issue, please contact the undersigned at (916) 324-5293.

Sincerely,

/s/ Robert R. Anderson
ROBERT R. ANDERSON
Chief Assistant Attorney General

For BILL LOCKYER
Attorney General

Appendix B

ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE
INTEROFFICE MEMORANDUM

DATE: May 9, 2002
TO: All Division and Section Chief Counsels
FROM: Patrick Irvine
Solicitor General
CC: *Nevada v. Hicks*, 121 S. Ct. 2304 (2001)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304 (2001), the United States Supreme Court held that Indian tribal courts lack jurisdiction over civil actions brought against non-Indian state officials for tortious conduct occurring on a reservation while in the performance of a state law enforcement function. In *Hicks*, state game and fish officers searched a tribal member's home on the reservation for fruits of a state crime pursuant to a state warrant that had been approved by the tribal court. Language in the opinion and concurring opinions discussing the scope of state jurisdiction over tribal lands has caused concern among tribal governments that federal, state and local law enforcement agencies will read the opinion as giving state agencies broad jurisdiction to enforce state laws in Indian country. This concern is not confined to criminal cases, but could encompass civil summons, property seizure orders, orders relating to child welfare cases, and other official actions of state courts. Specifically, the Court stated:

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state

> officers in executing process related to the violation, off-reservation, of state laws is not essential to tribal self-government or internal relations – to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.

121 S. Ct. at 2313. This language should not be read out of context; *Nevada v. Hicks* involved a search warrant that was approved by a tribal judge. Similarly, any service of process or other official action by state officials must be viewed in the context of tribal sovereignty and will certainly involve fact specific questions.

The need for careful analysis is shown by a recent Ninth Circuit case in which a district attorney and county sheriff were found to be liable under Section 1983 for executing a search warrant on a tribe seeking tribal employment records. *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002). The court held the county did not have jurisdiction to execute a search warrant against tribal property. *Bishop Paiute* does not cite *Nevada v. Hicks*, although it was argued and decided after *Hicks* was issued, so it does not directly limit the broad language of the decision. Nevertheless, the Ninth Circuit decision shows that there are risks associated with acting without a full and complete analysis of the law and facts involved in a particular case.

Therefore, it is the position of this Office that *Nevada v. Hicks* should be narrowly read and does not represent an expansion of state jurisdiction. All agencies should continue to cooperate and coordinate law enforcement activities and investigations

with the appropriate tribal law enforcement agency. Where other sate and local law enforcement agencies seek this Office's assistance in investigating and prosecuting crimes connected to a tribal member residing on a reservation, we should advise them to operate in the same manner, coordinating law enforcement activities with the appropriate tribal law enforcement agency. While the scope of state jurisdiction in light of *Nevada v. Hicks* may require further judicial clarification, our primary concern should be to avoid situations that may create dangers for the public and law enforcement personnel.

Arizona tribal governments have been informed of this Office's position. This memo may be shared with state law enforcement agencies.

Appendix C

Law Enforcement Coordinating Committee
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February 11, 2002

Karl G. Auerbach, Assistant Chief
Salt River Police Department
10005 E. Osborn Road
Scottsdale, AZ 85256

RE: ***Nevada v. Hicks***

Dear Assistant Chief Auerbach:

I'm sure by now you are aware of the recent Supreme Court case, *Nevada v. Hicks*, a decision that has a potential for great impact on existing state, county, and tribal law enforcement relationships in Arizona. As the Chairman of the Law Enforcement Coordinating Committee, I write to encourage continued cooperation between all state, county, tribal and federal law enforcement agencies in the wake of this decision.

This decision has created a fervor of discussion due to the potential negative impact that it has on historic, developing, and existing Arizona state, county, and tribal law enforcement agreements. Statewide meetings involving state, county and

tribal agencies and government representatives have already begun and will continue to take place in the coming months to determine the impact of this decision on existing Arizona state laws, policies and procedures.

Law enforcement in Arizona has a proud history of cooperation and professionalism. While the impact and meaning of the *Nevada v. Hicks* decision is discussed, it is my hope that state, county and federal law enforcement agencies will continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency. To do otherwise, would create public safety concerns and reverse the high standards of professionalism each of our agencies have set.

I am proud to represent the LECC, an organization that has helped to create open dialogue and cooperation in combating crime in Arizona. Working together, we will continue to provide safe living and working environments for all Arizona citizens.

I look forward to seeing you in Prescott this May.

Sincerely yours,

/s/ Paul K. Charlton
Paul K. Charlton
United States Attorney
District of Arizona

No. 02-281

Supreme Court, U.S.
FILED
FEB 27 2003
CLERK

In The
Supreme Court of the United States

INYO COUNTY, a public entity; PHIL MCDOWELL, Individually and as District Attorney and DAN LUCAS, Individually and as Sheriff,

Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY and BISHOP PAIUTE GAMING CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF NEW MEXICO, ARIZONA, MONTANA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS IN PART

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BRIEF OF AMICI CURIAE

The States of New Mexico, et alia, respectfully submit their brief as amici curiae through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The Amici States only address Petitioners' allegations of the impacts to state law enforcement efforts should the Court not reverse the Ninth Circuit Court of Appeals in this case.

INTEREST OF THE AMICI CURIAE

The Amici States have an interest in strengthening cooperative relationships between Indian tribes and States as governmental entities with separate and distinct sovereign interests. The Amici States prefer to cooperate with tribes and work together in a mutually respectful, government-to-government relationship. The Amici States disagree with the Petitioners' allegations that if State law enforcement agencies are not allowed to forcibly enter tribally-owned buildings under the authority of a search warrant, among other dire consequences, mass murderers and rapists will find refuge on hundreds of Indian reservations throughout America. Brief of Petitioners at 21-24. No legitimate government has an interest in becoming a sanctuary for criminals or criminal activity because that would only result in undermining the purpose of government – the protection of the common good through the enactment of laws and the enforcement of those laws.

In reality, many States and tribes work together to provide law enforcement for the mutual benefit of their citizens because States and tribes share adjacent lands, resources and citizens. In addition to agreements regarding the environment, resource conservation, taxation and

water rights, many States and tribes enter into agreements that establish their respective rights and the procedures each must follow to combat criminal activity that crosses tribal-state borders.

SUMMARY OF ARGUMENT

I. This Court's decision should not be premised upon the assumption that Indian lands will become havens of lawlessness if the Ninth Circuit Court of Appeals is not reversed. Amici States have not asserted unilateral authority to impose their criminal laws and procedures upon tribal governments in the past and have not experienced any resultant havens of lawlessness. State law enforcement has grown accustomed to the jurisdictional lines with respect to crimes committed in Indian country and fugitives in Indian country. States have been able to deal with federal and tribal law enforcement agencies through cooperative agreements that address common concerns of the respective governments.

Amici States have not found it necessary to use deadbolt cutters to clip locks off tribally owned buildings to obtain tribal records for law enforcement purposes. Instead, Amici States have enacted laws and policies that encourage cooperation between the States, the federal government and the tribes to address the States' law enforcement concerns. To date, this approach has been successful.

II. The Indian Gaming Regulatory Act 25 U.S.C. Section 2701, et seq. ("IGRA") authorizes an Indian tribe to have casino-style gaming only if the tribe enters into a

compact with the State. IGRA allows a State to include in tribal-state gaming compacts provisions for State jurisdiction to investigate and prosecute tribal casino employees to ensure the honesty of Indian gaming. Thus a process is available to States to negotiate terms with tribes that would have addressed the issues raised in this case.

ARGUMENT

I. Indian Reservations Are Not Havens For Criminals

As underscored in the Brief for the United States as Amicus Curiae in this case, most issues regarding criminal jurisdiction on Indian lands have been resolved. Brief for United States at 16-18. A State has jurisdiction to investigate and prosecute crimes committed on a reservation that exclusively involve non-Indians. The federal government and the tribes have jurisdiction over crimes involving an Indian perpetrator or victim. Under Public Law 280, some States have been given jurisdiction over crimes committed by or against Indians on Indian reservations. A State also has jurisdiction to prosecute tribal members for crimes committed off the reservation.

States like New Mexico have taken steps to insure Indian reservations do not become havens for criminals, regardless of the States' ability to actually enter Indian lands to enforce the law. Prior to this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), New Mexico law enforcement officials were not allowed to enforce State criminal laws against Indians residing on an Indian reservation for crimes committed off-reservation. *Benally v. Marcum*, 89 N.M. 463, 553 P.2d 1270 (1976); *State v.*

Yazzie, 108 N.M. 677, 777 P. 2d 916 (Ct. App. 1989); *City of Farmington v. Benally*, 119 N.M. 496, 892 P.2d 629 (Ct. App. 1995).

Although this Court has expressed concern that a federal enclave not become an asylum for fugitives from justice, New Mexico did not experience such consequences prior to the *Hicks* decision. Rather, New Mexico set the groundwork for cooperation between the State and the tribes located within New Mexico to assure the State's interest in law enforcement was protected.

New Mexico law allows tribal police officers to be commissioned by the chief of the New Mexico State Police. *See* N.M.S.A. 1978, Section 29-1-11(B). Once commissioned, the tribal police officer is empowered to enforce state criminal laws on an Indian reservation. Section 29-1-11(A) and (C)(8). New Mexico also funds tribal police to enhance the efficiency and effectiveness of law enforcement in New Mexico if the tribe has commissioned its officers by the State. *See* N.M.S.A. 1978, Section 29-13-2.1(D). Tribal police attend the New Mexico Law Enforcement Academy for training to become certified by the State. Additionally, New Mexico law authorizes any State or local law enforcement agency to enter into a mutual aid agreement with an Indian tribe with respect to any law enforcement matter under the Mutual Aid Act. *See* N.M.S.A. 1978, Section 29-8-1 to 29-8-3.

Under these law enforcement provisions, New Mexico has entered into agreements with the Navajo Nation, Jicarilla Apache Nation, and Pueblo of Taos whereby the New Mexico State Police issue commissions to tribal police officers. Similar agreements for cross-deputization, law enforcement, and criminal prosecution purposes have been

entered into between counties and tribes, such as Sandoval County, Bernalillo County, McKinley County, Valencia County, Santa Fe County and the Navajo Nation and the Pueblos of Sandia, Pojoaque, Santa Ana, Isleta and Zia.

Similarly, Washington law authorizes the Washington State Criminal Justice Training Commission to offer training for Indian tribe officers and employees engaged in law enforcement activities. Wash. Rev. Code §43.101.230. State law provides that one of the thirteen members of the Board on Law Enforcement Training Standards and Education, which recommends programs and standards to the Commission, "must represent tribal law enforcement in Washington." Wash. Rev. Code §43.101.315(1)(f). State and tribal officials in Washington have met and signed agreements to strengthen tribal/state relations in order to "work together to preserve and protect our natural resources and to provide economic vitality, educational opportunities, social services and law enforcement that allow the governments to protect, serve and enhance their communities." *See, e.g.,* 1999 Agreement for "Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium," text available at http://www.goia.wa.gov/govtogov/agreement.html (February 25, 2003).

The result of the efforts by Amici States and various tribes has been the development of statutes and agreements with tribal law enforcement agencies that address the public safety concerns of each government. Amici States are proud of those efforts and do not want the Court to be misled by the Petitioners as to the state of law enforcement on Indian lands.

II. IGRA Gives States The Option To Assume Jurisdiction Over Indian Casinos Through The Compacting Process

The Bishop-Shoshone Indians of the Bishop Community ("Tribe") is a federally recognized tribe located on the Bishop Paiute Reservation in California. The Tribe owns the Bishop Paiute Gaming Corporation, which operates and manages a casino under a compact with the State of California under IGRA. Pet. App. 12a. This case concerns the efforts of a local law enforcement agency to use the State's criminal process against this tribally owned casino to investigate a crime committed off the reservation. Under IGRA, a State is free to seek criminal jurisdiction over the operations of a tribal casino if it so decides.

The declared policy of Congress in enacting IGRA is to provide a statutory basis for the regulation of gaming by Indian tribes adequate to shield it from organized crime and other corrupting influences to assure that the gaming is conducted fairly and honestly. *See* 25 U.S.C. Section 2702(2). To implement this policy, the State is authorized by IRGA to include provisions in a compact relating to the application of State criminal laws directly related to and necessary for the licensing and regulation of gaming on Indian lands. The State may also allocate to itself the criminal jurisdiction necessary for the enforcement of the State's criminal laws made applicable under the compact. *See* 25 U.S.C. Section 2710(d)(3)(C)(i) and (ii).

Thus, States have the ability to include in a compact a provision that prohibits the employment at tribal casinos of criminals or those engaged in criminal activities. IGRA authorizes States to include in a tribal-state compact State criminal jurisdiction over casino employees engaged in

criminal activities, to assure that Indian gaming is free from corrupting influences. Thus, under the facts of this case, the compacting process provides the avenue to address law enforcement concerns between the States and the tribes in a cooperative fashion.

CONCLUSION

In considering the decision of the Ninth Circuit Court of Appeals below, this Court should not be influenced by allegations that Indian reservations will become havens for criminals if States do not have the authority to impose their criminal process upon tribal governments for crimes committed off-reservation.

Respectfully submitted,

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